

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`



Purchased for Law.

Norton. 1846.

L. Rom. A 13 d. 69

Roman
553

C778



cup

L



THE

INSTITUTES

OF

Justinian.

WITH NOTES

BY THOMAS COOPER, ESQ.

Professor of Chemistry at Carlisle College, Pennsylvania.

PHILADELPHIA:

PRINTED FOR P. BYRNE.

1812.

BODLEIAN
P
-1 JAN 1962
LIBRARY

[redacted]

District of Pennsylvania, to wit:

L. S. BE IT REMEMBERED, That on the twenty-fourth day of October, in the thirty-seventh year of the Independence of the United States of America, A. D. 1812, P. trick Byrne, of the said district, hath deposited in this office, the title of a book, the right whereof he claims as proprietor, in the words following to wit:

"The Institutes of Justinian. With Notes, by Thomas Coo-
"per, Esq. Professor of Chemistry, at Carlisle College, Penn-
"sylvania."

In conformity to the act of the Congress of the United States, intitled, "An act for the encouragement of learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies during the times therein mentioned."—And also to the act, intitled, "An Act supplementary to an Act, intituled, "An Act for the encouragement of learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies during the times therein mentioned," and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

D. CALDWELL,
Clerk of the District of Pennsylvania.

CONTENTS.

PREFACE, - - - - - - v

Dr. Harris's Brief History of the Roman Law, - - ix

Justinian's Institutes with the Translation, - - 1 to 391

The 118th Novel with Dr. Harris's Translation, - 393 to 400

Notes and References to the Institutes, - - - 401 to 655

Appendix First.

The Laws of the Twelve Tables, - - 656 to 664

Appendix Second.

Method of Citation used in reference to the various parts of the Corpus Juris Civilis, and Abbreviations, 665 to 667

Appendix Third.

List of Authors on the Civil Law, - - 667 to 670

Addenda et Corrigenda, - - - - - 671 to 672 *b*

Index to the Books, Titles and Sections of the Institutes, 673 to 695

Index to the Notes and References, - - - 697 to 714

PREFACE.

WHEN I first undertook to publish Justinian's Institutes (that I might not entirely renounce my accustomed studies) I contemplated nothing more than a republication of Harris's Edition, which has now become scarce; together with some additional notes, and a brief history of Roman Jurisprudence, by way of preface. On reading with attention Harris's Translation, I found the language so verbose, that I sat down to translate the first Book of the Institutes in my own way. It is true, my ear was better satisfied with my own performance; but I found so many co-incidences of expression, and so little room to improve the fidelity of Harris's Version, that I determined to adopt it as the groundwork of the present publication; and alter it no further, than to condense the expressions where they seemed to me needlessly diffuse. By so doing, I have abridged it to the amount of about one fifth of the whole, without sacrificing any thing necessary to the sense. Some few periphrases I have retained, and some I have added, when the original seemed to require elucidation; but, upon the whole, my aim has been to render this a faithful translation in as few words as possible. Perhaps I may be blamed for taking this liberty with Dr. Harris's work. Had it been a piece of poetry, I should have left it untouched; but meaning to give to the public as good a translation as I could furnish, I saw no reason why I should needlessly occupy the time of the reader, or increase the bulk of the book, by religiously retaining all its redundancies and imperfections.

I have inserted most of Harris's Notes, citing him where I have done so; but they are few and meagre. I have generally consulted the paraphrase of Theophilus, the short comments to the Corpus Juris Civilis of Gothofred, the translations and notes of Ferriere, Wood's Institutes, and Taylor's Elements of the Civil Law. I would gladly have procured, if I could, more sources of information, and I have taken much pains for that purpose, but in vain. The want of books has not been the only difficulty I have met with. All the notes and references I had collected, were consumed by fire on my road from Northumberland hither, last November. An accident afterwards deprived me of my eye-sight for about a week, and rendered exertion painful to me for a considerable time. I could ill spare these defalcations from the occasional leisure which my chemical lectures allowed me, but I have endeavoured to make the best use of the opportunities that remained.

Unable to procure the books I sent for, I have declined for the present any history of the Roman law. Those who cannot resort to the

more voluminous and laborious works enumerated in the appendix, may collect much useful knowledge from the shorter and more popular compilations of *Ferriere*, whose History of the Roman Law was translated by Dr. Beaver, and published in 1724—from *Gibbon's* eighth volume of his Roman History, and *Butler's* Horæ Juridicæ Subsecivæ: together with the Roman Antiquities of *Kennet* and *Adams:* all of them works of merit, and not scarce.

A knowledge of the Civil Law, sufficient for the purposes of an American Lawyer, north of New-Orleans, may be obtained from *Domat* and *Wood*, and the Treatises of Drs. *Ayloffe*, *Schomberg*, *Halifax* and *Browne:* but neither Domat nor Wood, are superseded by any or all the rest. Indeed a condensed digest of the Civil Law, is yet a desideratum; which if the present publication should be approved of, I may be tempted to undertake.

"The civilians of the darker ages," (says Gibbon, 8 Rom. Hist. 2.) "have established an absurd and incomprehensible mode of quotation, "which is supported by authority and custom. In their references to the "Code, the Pandects, and the Institutes, they mention the number, not "of the *book* but only of the *law*, and content themselves with reciting "the first words of the *Title* to which it belongs: and of these titles "there are more than a thousand. Ludewig, (Vit. Justiniani, p. 268,) "wishes to shake off this pedantic yoke; and I have dared to adopt the "simple and rational method of numbering the book, title, and law."

The English writers generally follow the mode of citation recommended by Gibbon, and as I think it the most convenient, I have also adopted it. Thus, Inst 4. 15. 2, means, Institutes, book 4, title 15, section 2. Dig. 41. 9. 1. 3, means Digest, book 41, title 9, law 1, section 3, which the foreign jurists would cite thus, l. 1. § 3, or § 3. l. 1. Dig. pro dote: or *ff pro dote:* Dig. and *ff* being equivalent: that is, section 3 of law 1, of the book and title of the Digest or Pandects which is entitled *pro dote.* The two letters *ff* designate nothing but a careless mode of writing the Greek letter π, the first letter of πανδεκται, Pandects, "General Receivers;" which was a common title of the Greek miscellanies. Plin. Præf. ad Hist. Natur., 8 Gibbon's Rom. Hist. p. 37. 76.

So, D. or Dig. 18. 4. 2. 7, is the same with § 7. l. 2. Dig. (or *ff*) *de hæredit, vel act.* Or, the 7th section of the 2d law of the book and title of the Digest or Pandects, that begins *De hæreditate vel actione vendita.*

In like manner, Cod. 7. 68. 2, means the 7th book, 68th title, and 2d law of the Justinian Code. The foreign writers would cite it, l. 2. Cod. *si unus ex pluribus appellaverit.* In like manner Cod. 8. 32. 1. would be cited by the civilians on the continent of Europe, l. 1. Cod. *si unus ex pluribus heredibus creditoris, &c.*; meaning the first law of the Codex that is entitled with those words.

Again, l. 1. tit. 52. Cod. *de his qui ante.* I should cite thus, Cod. 6. 52. 1, meaning the 6th book, 52d title, and 1st law of the Justinian Code.

It may be noted, that the Code, the Digest, and the Institutes, form one system; of which the Code was first compiled and published in the third year of Justinian. Then the Digest was compiled, and published

in the seventh year of that emperor's reign; the Institutes were compiled after the Digest, but published a month before, to wit, 21st November, A. D. 533. Wyndham v. Chetwind, 1 Burr. Rep. 426. The *Edicta*, the *Novellæ Constitutiones* or *Authenticæ*, the *Basilica*, &c. were subsequent additions or innovations. 8 Gibb. 45. 46.

In citing the *Authentics*, there may appear some ambiguity. The Novels are entitled, Authenticæ, seu Novellæ Constitutiones. These are cited either by the collation, title and chapter, or by the number of the novel, or by the beginning words of the title of the collation. Thus, Novell. 8. 1. Nov. tit. 8. ch. 1. Auth. Collat. 2. 2. 1. ch. 1. tit. *ut judices*, Auth. Coll. 2, mean the same thing; viz. the first chapter of the 8th Novel Constitution, being the first chapter of the second title, (beginning *ut judices*) of the second collation.

But a summary of the Authentics is inserted in the Justinian Code, usually in italic character, and these are referred to by the Code under which they are inserted. Thus in the instance given by Ferriere, *Authentica cum testator, Codice ad legem Falcidiam*, means the summary of the Authenticæ beginning *sed cum testator*, inserted in the 50th title of the Justinian Code, *ad legem Falcidiam*. These observations are necessary to an English student, in addition to Ferriere's directions, which I have inserted as a second appendix. The double index to the generality of editions, will render these remarks intelligible.

As to the *Edicts* of Justinian, the *Leonine* Constitutions, the *Basilica*, and other tracts sometimes published with the Corpus Juris, they are easily distinguished, by a mode of reference that involves no ambiguity.

Generally speaking, I have actually consulted all the passages referred to in the Code and Digest by numeral figures, after the *English* mode of citation. The most part of the passages referred to by the *foreign* mode of reference, I have taken at second hand. Generally speaking also, the references to the English and American reporters, have been made after actually consulting the cases, for the point to which they are applied.

I shall insert as an appendix, Ferriere's Chap. on the mode of citation, and the abbreviations in use, in order to render more intelligible to the English reader, the references of foreign jurists.

I intended also to have inserted the Latin text of the *Leges Regiæ*, or *Jus Papirianum*, and the laws of the Twelve Tables. But I greatly doubt about the authenticity of the *Jus Papirianum;* and I incline to think with Gibbon, 8 Rom. Hist. 5, that the Caius (Sextus) Papirius, who is said to have revised the Laws of Numa, left nothing written; and that the Jus Papirianum of Granius Flaccus (Lacinianus) was compiled in the time of Cæsar. Gibbon speaks very slightingly of the attempt to restore these laws, (thirty-six altogether) by the Abbè Terasson. Nor do I give any credit to the tables, from whence Franciscus Balduinus, and Paulus Manutius have given us eighteen of these laws, to which Pandulphus Pratcius has added six. The twelve more collected from various sources by Terasson, I have had no opportunity of examining. Those I have mentioned, I find in *Rosini Antiq. Rom. Corp.* quto. 1685. Amstel. page 556. who has given us a collection of laws of

Romulus and Numa, of no moment; and whether the collection be as complete as the sources of information will furnish, I have no means of investigating.

The laws of the Twelve Tables are collected from scattered passages in Cicero—Dionysius Halicarnasseus—Livy—Sextus Pompeius—Festus—Pliny—Macrobius—Agellius—Pomponius—and from the Justinian Digests. The Latin is obsolete and obscure, and stands in need of a good comment.

I have before me in Rosinus, the collection and arrangement of Franciscus Hotomannus, and Joannes Crispinus; another of Justus Lipsius; another of Ludovicus Charondas; and another of Theodorus Marcilius; as well as the edition and arrangement of the same laws by D. Gothofred at the end of his Corpus Juris Civilis.

That the reader, (in the words of Gothofred) may not be entirely ignorant, rather than that he may be accurately informed what the Laws of the Twelve Tables were, *non tam ut ea Lector cognosceret, quam ne ignoraret*, I shall insert Hooke's translation from Catrou and Rouillè. It is, as the subject requires, paraphrastic; but after perusing the Latin text, and attending to the comments collected by Rosinus, and those of D. Gothofred, I am satisfied that the text is as accurately paraphrased as can reasonably be expected; and therefore I have inserted the translation in the appendix.

Lastly, I have given a catalogue of the best writers on the Roman law, collected from the Bibliotheque of Camus, the notes and observations of Gibbon in his Roman History, of Butler in his *Horæ Juridicæ Subsecivæ*, and my own reading.

I have said nothing about the utility of a knowledge of the Civil Law. Professional men who carefully peruse the reported cases, whether of the British or the American courts, will find from the frequency of reference to the Justinian Collections, that a competent knowledge of the general principles of the Civil Law, is expected as a matter of course among the Bar, as well as upon the Bench. Indeed the earliest authors on the Laws of England, Bracton, Fleta, &c. borrow greatly from the Civil Law. I refer for instance to the first twenty or thirty pages of Bracton, who borrows not only his arrangement, but the substance and frequently the expressions from the Civil law. Nor can I see how any man can be considered as a well read lawyer, who is ignorant of a system, matured by the experience of the most polished and powerful nation of antiquity, and which still forms the body of modern Law, in almost every nation on the continent of Europe.

THOMAS COOPER.

September 30th, 1812.

☞ The reader is requested to note the references to the Addenda et Corrigenda.

A BRIEF ACCOUNT

OF THE

Rise and Progress of the Roman Law.

(Dr. Harris.)

THE *Roman* state was at first governed solely by the authority of *Romulus;* but, when the people were increased, he divided them into thirty *Curiæ*, which he constantly assembled for the confirmation of his laws: and this practice of consulting the people was afterwards followed by the *Roman* kings, all whose laws were collected by *Sextus Papirius*, and called *jus Papirianum*, from the name of their compiler. But, after the expulsion of *Tarquin* and the establishment of the republic, the greatest part of those regal laws soon became obsolete; and those, which still remained in force, related chiefly to the priesthood. It thus happened, that the *Romans* for many years laboured under great incertainty in respect to law in general; for, from the commencement of the consular state to the time of establishing the XII tables, they were not governed by any regular system. But at length, the people growing uneasy at the arbitrary power of their magistrates, it was resolved, after much opposition from the patricians, that some certain rule of government should be fixed upon: and, to effect this purpose, a decemvirate was first appointed, composed solely of senators, who, partly from the laws of *Greece* and partly from their own laws still subsisting, framed ten tables, which, in the year of *Rome* 303, were submitted to the inspection of the people, and highly approved of. These however were still thought to be deficient; and therefore in the year following, when a new decemvirate was appointed, which consisted of seven patricians and three plebeians, they added two tables to the former ten: and now the whole was regarded but as one body of law, and intitled, by way of eminence, the *twelve tables*. But, although these new collected laws were most deservedly in

Curiæ.] Vid. *Pomponium*, ff. 1. t. 2. *De origine juris.*

Jus Papirianum.] "Is liber appellatur "*jus civile Papirianum*, non quia *Papirius* "de suo quicquam adjecit, sed quod leges "sine ordine latas in unum composuit." vid. ff. 1. t. 2. l. 2. This body of law is not now extant, nor any part of it, except a short extract of 8 or 10 lines, which may be read in the 3d book of *Macrobius's Saturnalia*, cap. 11.

From the commencement of the consular state.] The consular state was established in the year U. C. 245, and the laws of the xii tables were not perfected, till the year 304.

Were submitted to the inspection of the people.] "Tum legibus condendis opera "dabatur, ingentique hominum expectatione "ne propositis decem tabulis, populum ad "concionem advocaverunt; et, quod bonum, faustum, felixque reipublicæ, ipsis,

the highest esteem, yet their number was soon found insufficient to extend to all matters of controversy, their conciseness was often the occasion of obscurity, and their extraordinary severity called aloud for mitigation. It therefore became a consequence, that the twelve tables continually received some explanation, addition, or alteration, by virtue of a new *law*, a senatorial *decree*, or a *plebiscite*. And here it will be proper to observe, how they differ: a *plebiscite* was an ordinance of the plebeians or commonalty, which had the force of a law, without the authority of the senate; and a *senatus-consultum*, or senatorial decree, was an order made by the senators assembled for that purpose; but to constitute a *law*, properly so called, it was necessary, that it should first be proposed by some magistrate of the senate, and afterwards be confirmed by the people in general. Recourse was also had to the interpretation and decisions of the learned, which were so universally approved of, that, although they were unwritten, they became a new species of law, and were called *auctoritas prudentum* and *jus civile*. It must here be observed, that, soon after the establishment of the twelve tables, the learned of that time composed certain solemn forms, called *actions of law*, by

" liberisque eorum esset, ire et legere leges " propositas jussere: se, quantum decem " hominum ingeniis provideri potuerit, om- " nibus, summis, infimisque jura æquasse; " plus pollere multorum ingenia consilia- " que. Versarent in animis secum unam- " quamque rem; agitarent deinde sermoni- " bus; atque in medium, quid in quaque re " plus, minusve esset, conferrent. Eas le- " ges habiturum populum Romanum, quas " consensus omnium non jussisse latas ma- " gis, quam tulisse, videri posset." *Liv.* l. " iii. cap. 33, 34.

And their extraordinary severity.] One of the laws, here hinted at, is the following: AST, SI PLURES ERUNT REI, TERTIIS NUNDINIS PARTIS SECANTO; SI PLUS MINUSVE SECUERINT, SE FRAUDE ESTO: SI VOLENT ULS TIBERIM PEREGRE VENUNDANTO. *Grav. op.* p. 284. *i. e.* " If a " debtor is insolvent to several creditors, " let his body be *cut* in pieces on the third " market-day. It may be cut into more or " fewer pieces with impunity; or, if his " creditors consent to it, let him be sold " to foreigners beyond the *Tyber*." *Hook's Roman hist.* vol. 1. p. 316

Such is the sense, in which this law has been generally understood by both ancients and moderns. But it has lately received quite a new construction, very much to the honour of ancient *Rome*, from two authors, not less distinguished for their abilities in literature than their knowledge in the civil law, who from many authorities interpret the word *secanto*, as implying simply a division, and the word *partis*, as denoting the parts of the debtor's estate, and not the parts of his body; so that they understand the expression *partis secanto*, not as a direction, that the body of an insolvent debtor shall be cut into pieces, but as if it meant, that his estate and services should be divided among his creditors in proportion to their respective claims. vid. *Bynkershoek's* work's, vol. 1. obs. 1. and Dr. *Taylor's* commentary, *De inope debitore* dissecando.

But the reader is left to frame his own judgment of this interpretation, when he has read the apology for this law, which *Aulus Gellius* has given us in the person of *Cæcilius;* and also the opinion of *Tertullian*, who was a lawyer by profession. " Nihil profecto [says *Cæcilius*] " immitius, nihil immanius, " nisi, ut re ipsa apparet, eo consilio tanta " immanitas pœnæ denunciata est, ne ad " eam unquam perveniretur: *addici* namque " nunc et *vinciri* multos videmus; *dissectum* " esse antiquitus neminem, equidem neque " legi neque audivi." *Aulus Gell.* lib. xx. cap. 1. *Grav.* lib. vii. cap. 72.

And *Tertullian* writes as follows. " Sed " et, judicatos in partes secari a creditori- " bus, leges erant; consensu tamen publico " *crudelitas* postea erasa est." *Apologet.* cap. 4.

Solemn forms.] " Civile jus, repositum " in penetralibus pontificum, Cn. Flavius " evulgavit, fastosque circa forum in albo " proposuit, ut, quando lege agi posset, " sciretur." *Liv.* lib. ix. cap. 46. " Veteres, " qui huic scientiæ præfuerunt, obtinendæ " atque augendæ potentiæ suæ causa, per- " vulgari artem suam noluerunt, *&c.*" *Cic. de orat.* lib. 1. c. 46. " Jus civile per multa " sæcula inter sacra cæremoniasque Deo-

which the process of all courts and several other acts, as adoption, emancipation, &c. were regulated. These forms were for above a century kept secret from the public, being in the hands only of the priests and magistrates; but about the year U. C. 448 they were collected and published by one *Flavius*, a scribe; and, from him, called the *Flavian law;* for which acceptable present the people in general showed many instances of their gratitude. But, as this collection was soon found to be defective, another was afterwards published by *Sextus Ælius*, who made a large addition of many new forms, which passed under the title of *jus Ælianum*, from the name of the compiler.

In process of time there also arose another species of law, called the *prætorian edicts;* which, although they ordinarily expired with the annual office of the prætor, who enacted them, and extended no further than his jurisdiction, were yet of great force and authority: and many of them were so truly valuable for their justice and equity, that they have been perpetuated as *laws*.

These were the several principal parts of the *Roman* law, during the free state of the commonwealth; but, after the re-establishment of monarchy in the person of *Augustus*, the law received two additional parts; the imperial *constitutions* and the *answers* of the lawyers.

The constitutions soon became numerous, but were not framed into a body, till the reign of *Constantine* the great; when *Gregorius* and *Hermogenes*, both lawyers of eminence, collected in two codes the constitutions of the pagan emperors, from the reign of *Adrian* to that of *Diocle-sian* inclusive: but these collections were not made by virtue of any public authority, and are not now extant.

Another code was afterwards published by order of the emperor *Theodosius* the younger, which contained the constitutions of all the christian

" rum immortalium solisque pontificibus " notum." *Val. Max.* l. ii. c. 5.

The *Flavian law.*] " Postea, cum Ap- " pius Claudius proposuisset, et ad formam " redegisset has actiones, Cnæus Flavius " scriba ejus, libertini filius, subreptum li- " brum populo tradidit; et adeo gratum fuit " id munus populo, ut Tribunus plebis fieret, " Senator, et Ædilis curulis, &c." ff 1. t. 2. *De orig. juris. Liv.* lib. ix. sub fin. *Val. Max.* lib. ii. cap. 5. *Aul. Gell* lib vi. c. 9.

Tully, in his oration for *Murena*, is remarkably severe upon these forms, and treats both them and their abettors with that just contempt, which they most certainly deserve. " Primum dignitas in tam tenui " scientia quæ potest esse? res enim sunt " parvæ; prope in singulis literis atque in- " terpunctionibus occupatæ, &c. &c. &c." *Pro Murena*, cap 6. *Epist. ad Att.* lib. vi. ep. 1. *De oratore*, lib. 1. cap. 41.

But, notwithstanding this, the use of particular forms was very strictly adhered to, till the reign of *Constantine* the emperor, who, to his great honour, put an end to these subtilities. His rescript to *Marcellinus* is in these words. " Juris formulæ, aucupatione " syllabarum insidiantes, cunctorum acti- " bus radicitus amputentur." Cod. 2. t. 58.

Gregorius and *Hermogenes.*] vid. *Gothofredi* prolegom. ad cod. *Theodosianum*, cap. 1. et *Heineccii* hist. jur. civ. lib. 1. cap. 5 sect. 368, &c.

emperors, down to his own time; and this was generally received both in the eastern and western empires.

But these three codes were still far from being perfect; for the constitutions, contained in them, were often found to be contradictory; and they wanted, but too plainly, that regulation, which they afterwards underwent through the care of *Justinian;* who in the year of Christ 528 ordered the compilation of a new code, which was performed and published the year following by *Tribonian* and others; the three former codes being suppressed by the express ordinance of the emperor. When this work was thus expeditiously finished, the emperor next extended his care to the *Roman* law in general, in order to render it both concise and perfect. The answers and other writings of the ancient lawyers had long since acquired the full force of a *law*, and were now so numerous as to consist of near two thousand volumes; from which, by command of *Justinian*, the best and most equitable opinions were chosen; and being first corrected, where correction was necessary, were afterwards divided into fifty books, called *digests* or *pandects:* and, that they might be the more firmly established, the emperor not only prohibited the use of all other law-books, but also forbad, that any comment should be written upon these his new digested laws, or that any transcript should be made of them with abbreviations. But, during the time of compiling the *di-*

By the express ordinance.] "Hunc igitur "codicem in æternum valiturum judicio tui "culminis intimare perspeximus, ut sciant "omnes tam litigatores quam disertissimi "advocati, nullatenus eis licere de cætero "constitutiones ex veteribus tribus codici-"bus, vel ex iis, quæ novellæ constitutiones "ad præsens tempus vocabantur, in cogni-"tionalibus recitare certaminibus, sed so-"lum, eidem nostro codici insertis, consti-"tutionibus necesse est uti; falsi crimini "subdendis his, qui contra hoc facere ausi "fuerint," &c. *De Justinianeo codice confirmando.*

Near two thousand volumes.] "Postea "vero, maximum opus aggredientes, ipsa "vetustatis studiosissima opera, jam pene "confusa et dissoluta, eidem viro excelso "(Triboniano) permisimus tam colligere "quam certo moderamine tradere. Sed, "cum omnia percontabamur, a præfato viro "excelso suggestum, duo pene millia libro-"rum esse conscripta, quæ necesse esset "omnia et legere et perscrutari; quod cœ-"lesti fulgore, et summæ trinitatis favore, "confectum est, secundum nostra mandata, "quæ ab initio ad memoratum virum excel-"sum fecimus, et in quinquaginta libros "omne, quod utilissimum erat, collectum "est; et omnes ambiguitates decisæ, nullo "seditioso relicto; nomenque libris impo-"suimus *digestorum* seu *pandectarum.*" Cod. 1. t. 17. l. 2. *De vet. jur. enucl.*

Prohibited the use of all other law-books.] "Has itaque leges et adorate et observate, "omnibus antiquioribus quiescentibus, ne-"moque vestrum audeat vel comparare eas "prioribus, vel, si quid dissonans in utro-"que est, requirere; quia omne, quod hic "positum est, hoc unicum et solum obser-"vari censemus; nec in judicio nec in alio "certamine, ubi leges necessariæ sunt, ex a-"liis libris, nisi ab institutionibus, nostrisque "digestis, et constitutionibus a nobis com-"positis, aliquid vel recitare vel ostendere "conetur; nisi temerator velit falsitatis cri-"mini subjectus una cum judice, qui eorum "audientiam patiatur, pœnis gravissimis la-"borare." Cod. 1. t. 17. l. 2. § 19.

"Hoc autem tempestivum nobis videtur "et in præsenti sancire, ut nemo neque "eorum, qui in præsenti juris peritiam ha-"bent, neque, qui postea fierent, audeat "*commentarios* his legibus adnectere; nisi "velit eas in Græcam vocem transformare "sub eodem ordine eademque consequen-"tia, sub qua et voce Romana positæ sunt; "hoc quod Græci κατα πoδα dicunt," &c. Cod 1. t. 17. l. 2. § 21.

With abbreviations.] "Eandem autem "pœnam falsitatis constituimus et adversus "eos, qui in posterum leges nostras, per "siglorum obscuritates, ausi fuerint con-"scribere; omnia enim, id est, et nomina "prudentum, et titulos, et librorum nume-"ros, per consequentias literarum volumus,

gests, it was thought expedient by *Justinian*, for the benefit of students, that an abridgment should be made of the whole *Roman* law; which work was soon performed in obedience to his order, and confirmed with the *digests*, under the title of *institutions*.

The emperor afterwards, upon mature deliberation, suppressed the first edition of his code, and published a second, which he intitled *Codex repetitæ prælectionis*, having omitted several useless laws, and inserted others, which were judged serviceable to the state.

The *Justinian*-law now consisted of three parts, the *institutions*, the *digests*, and the *second code*. But the emperor, after the publication of the *second code*, continued from time to time to enact diverse new constitutions or *novels*, and also several *edicts;* all which were collected after his decease, and became a fourth part of the law.

The 13 *edicts* of *Justinian* and most of the *novels* were originally conceived in the *Greek* tongue; and so great was the decline of the *Roman* language at *Constantinople* within forty years after the death of this emperor, that his laws in general were not otherways intelligible to the major part of the people, than by the assistance of a *Greek* version: but, notwithstanding this disadvantage, they still subsisted intire, till the publication of the *Basilica*, by which the east was governed, till the dissolution of the empire.

" non per sigla, manifestari." Cod. 1. t. 17. l. 2. § 22.

Confirmed with the *Digests.*] " Leges " autem nostras, quæ in his codicibus, id " est, institutionum seu elementorum et di- " gestorum, posuimus, suum obtinere robur " ex tertio nostro felicissimo sanctimus con- " sulatu præsentis duodecimæ indictionis, " tertio calendas januarias, in omne ævum " valituras, &c." Cod. 1. t. 17. l. 2. § 23.

Suppressed the first edition of his code.] " Nemini in posterum concedimus, vel " ex decisionibus nostris, vel ex aliis con- " stitutionibus, quas antea fecimus, vel ex " prima Justinianei codicis editione, aliquid " recitare; sed, quod in præsenti purgato et " renovato codice nostro scriptum invenitur, " hoc tantummodo in omnibus rebus et ju- " diciis et obtineat et recitetur: cujus scrip- " turam, ad similitudinem nostrarum insti- " tutionum et digestorum, sine ulla signo- " rum dubietate conscribi jussimus." *De emendatione cod* § 5.

Basilica.] " Versionibus juris Justinianei " Græcis, et novellis eadem lingua scriptis, " in foris scholisque utebantur, donec, de " eo in compendium mittendo, sæculo nono " cogitare inciperent imperatores Byzanti- " ni. Ex his primum Basilius Macedo anno " 838 ediderat πρόχειρον των νομων, quod con- " stabat titulis quadraginta. Deinde Leo " σοφος, patri Basilio succedens, collectionem " illam paternam perfecit, eamque sub titu- " lo διαταξεων βασιλικων promulgavit, anno " Christi 886. Denique subsecutus Leonem " Constantinus, cognomento Porphyroge- " neta, paternum opus sub incudem revoca- " vit, et libros illos βασιλικων publicavit sub " initium sæculi decimi. Et hi quidem sunt " libri illi βασιλικων, ex Græca institutionum, " pandectarum, codicis versione, Justinia- " ni novellis et edictis tredecim, nec non ex " juris-consultorum quorundam orientalium " paratitlis, aliisque libris, quin et patribus " et conciliis collecti; ita tamen ut multa " omissa videamus, quæ fortassis tum ab usu " recesserant, multas etiam leges in com- " pendium contractas, multa denique ex " posteriorum principum legibus et consti- " tutionibus addita animadvertamus. Opus " istud in sexaginta libros divisum, præter " pauca, quæ nondum integra reperiri po- " tuerunt, cum glossis græce et latine edi- " tum est a *Car. Annib. Fabrotto*, Paris. " 1647. fol. vol. vii." vid. *Heineccii hist. jur. civ.* l. 1. § 495.

The dissolution of the empire.] *Constantinople* was taken by the *Turks* and a period

The laws published by *Justinian* were still successful in the west; where, even in the life-time of the emperor, they were not received universally; and, after the *Lombard* invasion, they became so totally neglected, that both the *code* and the *pandects* were lost, till the 12th century; when it is said, that the *pandects* were accidentally recovered at *Amalphi*, and the *code* at *Ravenna*. But, as if fortune would make an atonement for her former severity, they have since been the study of the wisest men, and revered, as law, by the politest nations.

was put to the eastern empire in the year of Christ, 1453.

After the *Lombard* invasion.] The *Lombards* entered *Italy* under *Alboinus* about the year of Christ 568, in the reign of *Justin* the second, successor to *Justinian*.

At *Amalphi*.] "Eo tempore (anno Dom. 1130) "injustis perturbatisque comi iis, la-"cerarat ecclesiam falsus pontifex *Petrus* "*Leonis*, *Anacletus* secundus nuncupatus ab "sua factione; cujus dux erat *Rogerius* Apu-"liæ ac Siciliæ comes, Regis nomine a fal-"so pontifice donatus. Adversus *Anacle-"tum* creatus rite ac solenniter fuerat *In-"nocentius* secundus, cui favebat imperator "*Lotharius Saxo*, summa virtute atque pru-"dentia princeps; quo bellum gerente ad-"versus *Rogerium*, *Amalphi*, urbe Salerno "proxima, (quam perperam aliqui locant "in *Apulia*, *Melphium* cum *Amalphi* confun-"dentes,) inopinato reperti fuerunt digesto-"rum libri; quos *Pisani*, qui classe *Lotha-"rium* contra *Rogerium* adjuverant, præ-"mio bene navatæ operæ sibi exorarunt. "Pisis vero post longam obsidionem a *Ca-"ponio* militiæ duce strenuo expugnatis, "translati fuere *Florentiam*; ubi, pro Au-"gusta Mediceæ domus magnificentia, in "museo magni ducis conservantur. Hinc "promiscua Pisanarum et Florentinarum "apud scriptores pandectarum appellatio. "Iisdem temporibus repertum *Ravennæ* fuit "constitutionum imperialium volumen, "quod *codex* appellatur; indeque cæteros li-"bros juris, imo et digestorum aliud exem-"plar in lucem aliqui rediisse putant: nec "mirum, cum ea urbs longo tempore Ro-"manis legibus vixerit, et orientali Roma-"norum imperio diu obtemperavit. No-"vellæ vero constitutiones etiam antea per "Italiam vagabantur; utque mea fert opi-"nio, multi juris civilis libri, postquam in-"cessit homines cupido recipiendi Romani "juris, agniti potius fuere, quam reperti: "nam, et aliquot ante *Lotharium* annis, jus "civile Justiniani commemoravit *Ivo* Car-"notensis, et libros pandectarum; cum an-"tea, si occurrerent, forsan socordia et ob-"livione prætermitterentur." vid. *Gravinæ orig. jur. civ.* lib. 1. cap. 140. et *Hein. hist. jur. civ.* lib. 1. § 412.

PROŒMIUM

DE

CONFIRMATIONE INSTITUTIONUM.

IN NOMINE DOMINI NOSTRI JESU CHRISTI.

IMPERATOR, CÆSAR FLAVIUS JUSTINIANUS, ALEMANICUS, GOTHICUS, FRANCICUS, GERMANICUS, ANTICUS, ALANICUS, VANDALICUS, AFRICANUS, PIUS, FELIX, INCLYTUS, VICTOR AC TRIUMPHATOR, SEMPER AUGUSTUS—CUPIDÆ LEGUM JUVENTUTI S.

De usu armorum et legum.

IMPERATORIAM majestatem non solum armis decoratam, sed etiam legibus oportet esse armatam; ut utrumque tempus et bellorum et pacis rectè possit gubernari: et princeps Romanus non solum in hostilibus præliis victor existat, sed etiam per legitimos tramites calumniantium iniquitates expellat: et fiat tam juris religiosissimus, quam, victis hostibus, triumphator magnificus.

The imperial dignity should not only be supported by arms, but guarded by laws, that the people may be properly governed in time of peace as well as war; for a Roman emperor ought not only to be victorious in the hostile field, but should take every legal course to expel the iniquities of men regardless of law; and become equally renowned for a religious observance of justice, as for warlike triumphs.

De bellis et legibus Justiniani.

§ I. Quorum utramque viam cum summis vigiliis, summàque providentiâ, annuente Deo, perfecimus: et bellicos quidem sudores nostros barbaricæ gentes, sub juga nostra redactæ, cognoscunt: et tam Africa, quam aliæ innumeræ provinciæ, post tanta temporum spatia, nostris victoriis a cœlesti numine præstitis,

§ 1. *By our incessant labors, and the assistance of divine providence, we have pursued this double path: the Barbarian nations have acknowledged our prowess and submitted to our yoke; even* Africa *and many other provinces, after so long an interval, are again added to the* Roman *empire: and yet this vast people are*

iterum ditioni Romanæ, nostroque additæ imperio, protestantur. Omnes vero populi legibus tam à nobis promulgatis, quam compositis, reguntur.

governed by laws, either originally enacted, or promulgated anew, under our authority.

De compositione Codicis et Pandectarum.

§ II. Et cum sacratissimas constitutiones, antea confusas, in luculentam ereximus consonantiam, tunc nostram extendimus curam ad immensa veteris prudentiæ volumina; et opus desperatum, quasi per medium profundum euntes, cœlesti favore jam adimplevimus.

§ 2. *When we had arranged and brought into lucid harmony the hitherto confused mass of imperial constitutions, we then extended our care to the numerous volumes of ancient law; and have now completed, through the favour of heaven (wading as it were through a vast ocean) a work that might have been despaired of.*

De tempore, auctoritatibus, fine et utilitate compositionis Institutionum.

§ III. Cumque hoc, Deo propitio, peractum est, Triboniano, viro magnifico, magistro, et exquæstore sacri palatii nostri, et exconsule, nec non Theophilo et Dorotheo, viris illustribus, antecessoribus, (quorum omnium solertiam, et legum scientiam, et circa nostras jussiones fidem, jam ex multis rerum argumentis accepimus,) convocatis, mandavimus specialiter, ut ipsi nostrâ auctoritate, nostrisque suasionibus, Institutiones componerent; ut liceat vobis prima legum cunabula non ab antiquis fabulis discere, sed ab imperiali splendore appetere: et tam aures, quam animi vestri, nihil inutile, nihilque perperam positum, sed quod in ipsis rerum obtinet argumentis, accipiant: et quod priore tempore vix post quadriennium pri-oribus contingebat, ut tunc consti-

§ 3. *So soon as by the blessing of God this was accomplished, we summoned* Tribonian, *our former chancellor, with* Theopilus *and* Dorotheus, *men of known learning and tried fidelity, whom we enjoined by our authority to compose the following Institutes, that the rudiments of law might be more effectually learned, by the sole means of our imperial authority; and that your minds for the future should not be burdened with obsolete and unprofitable doctrines, but instructed in those laws only, which are allowed of and practiced: and, whereas Students formerly could scarcely sit down to the imperial constitutions under four years previous study, they may now, (having been thought worthy of our princely care, to which they are indebted for the beginning and end of their legal*

utiones imperatorias legerent, hoc vos à primordio ingrediamini, digni tanto honore, tantâque reperti felicitate, ut et initium vobis, et finis legum eruditionis, à voce principali procedat.

erudition) apply themselves immediately to that course of reading.

Diviso Institutionum.

§ IV. Igitur post libros quinquaginta Digestorum, seu Pandectarum, (in quibus omne jus antiquum collectum est, quod per eundem virum excelsum Tribonianum, nec non cæteros viros illustres et facundissimos, confecimus,) in quatuor libros easdem Institutiones partiri jussimus, ut sint totius legitimæ scientiæ prima elementa.

§ 4. *When therefore, by the assistance of* Tribonian *and other illustrious persons, we had compiled the fifty books, called* Digests *or* Pandects, *we directed that the Institutes should be divided into four books, which serve as elements of the science of law.*

Quid in Institutionibus contineatur.

§ V. In quibus breviter expositum est, et quod antea obtinebat, et quod postea, desuetudine inumbratum, imperiali remedio illuminatum est.

§ 5. *Wherein are briefly set forth the laws formerly in use, and those also, which having been overshadowed by disuse, are now brought to light by our princely care.*

Ex quibus libris compositæ sunt Institutiones, atque earum recognitio, et confirmatio.

§ VI. Quas, ex omnibus antiquorum Institutionibus, et præcipuè ex commentariis Caii nostri, tam institutionum, quam rerum quotidianarum, aliisque multis commentariis compositas, cum tres viri prudentes prædicti nobis obtulerunt, et legimus, et recognovimus, et plenissimum nostrarum constitutionum robur eis accommodavimus.

§ 6. *The four books of Institutes thus compiled by* Tribonian, Theophilus, *and* Dorotheus, *from all the institutions of the ancient law, but chiefly from the commentaries, institutions, and other writings of* Caius, *being presented to us, we read and diligently examined their contents; and, in testimony of our approbation, we have now given them our fullest* constitutional *authority.*

Adhortatio ad studium juris.

§ VII. Summâ itaque ope, et alacri studio, has leges nostras accipite: et vosmetipsos sic eruditos ostendite, ut spes vos pulcherrima foveat, toto legitimo opere perfecto, posse etiam nostram rempubliçam, in partibus ejus vobis credendis, gubernari.

§ 7. *Receive therefore and study these our laws with diligence and alacrity; and show yourselves so competent therein, that when your studies shall be finished, you may entertain a cheering hope of having a part of the government committed to your charge.*

D. CP. XI. Kalend. Decemb. *D.* JUSTINIANO *PP. A. III. COS.*

Given at *Constantinople* on the eleventh day before the calends of *December*, in the third consulate of the Emperor JUSTINIAN, always august. (21st Nov. 533.)

INSTITUTIONUM,

SEU

ELEMENTORUM,

D. JUSTINIANI

LIBER PRIMUS.

TITULUS PRIMUS.

DE JUSTITIA ET JURE.

D. 1. T. 1.

Definitio justitiæ.

JUSTITIA est constans et perpetua voluntas jus suum cuique tribuendi.

Justice is the constant and perpetual disposition to render every man his due.

Definitio jurisprudentiæ.

§ I. Jurisprudentia est divinarum atque humanarum rerum notitia, justi atque injusti scientia.

§ 1. Jurisprudence is the knowledge of things divine and human; the science of what is just and unjust.

De juris methodo.

§ II. His igitur generaliter cognitis, et incipientibus nobis exponere jura populi Romani, ita videntur posse tradi commodissimè, si primo levi ac simplici viâ, post deinde diligentissimâ atque exactissimâ interpretatione, singula tradantur; alioqui, si statim ab initio rudem adhuc et infirmum animum studiosi multitudine ac varietate rerum oneraverimus, duorum

§ 2. These definitions being premised, we shall commence our exposition of the Roman Law most conveniently, if we take at first the plainest and easiest path, and then proceed to treat each particular with the utmost exactness: for, if at the beginning we overload the mind of the student with a multitude and variety of topics, we may cause him either wholly to abandon his studies, or bring him

alterum, aut desertorem studiorum efficiemus, aut cum magno labore, sæpè etiam cum diffidentiâ, (quæ plerumque juvenes avertit,) seriùs ad id perducemus, ad quod, leviore viâ ductus, fine magno labore et fine ullâ diffidentiâ, maturiùs produci potuisset.

late to that knowledge through great labour and diffidence, which he might otherwise have acquired earlier with ease and confidence.

Juris præcepta.

§ III. Juris præcepta sunt: honestè vivere, alterum non lædere, suum cuique tribuere.

§ 3. *The precepts of the law are, to live honestly, to hurt no one, to give to every one his due.*

De jure publico et privato.

§ IV. Hujus studii duæ sunt positiones, publicum et privatum. Publicum jus est, quod ad statum rei Romanæ spectat. Privatum est, quod ad singulorum ultilitatem pertinet. Dicendum est igitur de jure privato, quod tripertitum est: collectum enim est ex naturalibus præceptis, aut gentium, aut civilibus.

§ 4. *The law is divided into public and private. Public law, regards the state of the commonwealth: but private law, of which we shall here treat, concerns the interest of individuals; and is tripartite, being collected from natural precepts, from the law of nations, and from municipal Regulations.*

TITULUS SECUNDUS.

DE JURE NATURALI, GENTIUM, ET CIVILI.

De jure naturali.

JUS naturale est, quod natura omnia animalia docuit: nam jus istud non humani generis proprium est, sed omnium animalium, quæ in cœlo, quæ in mari, nascuntur. Hinc descendit maris atque fœminæ conjunctio, quam nos matrimonium appellamus. Hinc liberorum procreatio, hinc educatio.

The law of nature is a law not only to man, but likewise to all other animals, whether produced on the earth, in the air, or in the waters. From hence proceeds that conjunction of male and female, which we denominate matrimony; hence the procreation and education of children. We perceive also, that other

Videmus enim, cætera quoque animalia istius juris peritia censeri.

animals are considered as having some knowledge of this law.

Distinctio juris gentium et civilis, a definitione et etymologiâ.

§ I. Jus autem civile à jure gentium distinguitur, quod omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum, jure utuntur: nam quod quisque populus sibi jus constituit, id ipsius proprium civitatis est, vocaturque jus civile, quasi jus proprium ipsius civitatis. Quod vero naturalis ratio inter omnes homines constituit, id apud omnes gentes peræque custoditur, vocaturque jus gentium, quasi quo jure omnes gentes utantur: et populus itaque Romanus, partim suo proprio, partim communi omnium hominum, jure utitur. Quæ singula, qualia sint, suis locis proponemus.

§ 1. *Civil law is distinguished from the law of nations, because every community governed by laws, uses partly its own and partly the laws which are common to all mankind. That law, which a people enacts for its own government, is called the civil law of that people. But that law, which natural reason appoints for all mankind, is called the law of nations, because all nations make use of it. The people of* Rome *are governed partly by their own laws, and partly by the laws, which are common to all men. Of these we shall treat separately in their proper places.*

Ab appellatione et effectibus.

§ II. Sed jus quidem civile ex unâquâque civitate appellatur, veluti Atheniensium: nam, si quis velit Solonis vel Draconis leges appellare jus civile Atheniensium, non erraverit. Sic enim et jus, quo Romanus populus utitur, jus civile Romanorum appellamus, vel jus Quiritum, quo Quirites utuntur: Romani enim a Romulo, Quirites a Quirino, appellantur. Sed, quoties non addimus nomen cujus sit civitatis, nostrum jus significamus: sicuti cum poëtam dicimus, nec addimus nomen, subauditus apud Græcos egregius Homerus, apud nos Virgilius. Jus autem gentium omni humano generi commune est: nam, usu exigente et

§ 2. Civil *laws take their denomination from that city, in which they are established: it would not therefore be erroneous to call the laws of* Solon *or* Draco *the civil laws of* Athens: *and thus the law, which the* Roman *people make use of, is styled the civil law of the* Romans, *or of the* Quirites; *for the* Romans *are also called* Quirites *from* Quirinus. *Whenever we mention the words* civil law, *without addition, we emphatically denote our own law; thus the* Greeks, *when they say* the poet, *mean* Homer, *and the* Romans Virgil. *The law of nations is common to all mankind and all nations have enacted some laws, as occasion and*

humanis necessitatibus, gentes humanæ jura quædam sibi constituerunt: bella etenim orta sunt, et captivitates secutæ, et servitutes, quæ sunt naturali juri contrariæ: jure enim naturali omnes homines ab initio liberi nascebantur: et ex hoc jure gentium, omnes penè contractus introducti sunt, ut emptio et venditio, locatio et conductio, societas, depositum, mutuum, et alii innumerabiles.

necessity required: for wars arose, and the consequences were captivity and servitude; both which are contrary to the law of nature; for by that law, all men are born free. But almost all contracts were at first introduced by the law of nations; as for instance, buying, selling, letting, hireing, partnership, a deposit, a loan and others without number.

Divisio juris in scriptum et non scriptum; et subdivisio juris scripti.

§ III. Constat autem jus nostrum, quo utimur, aut scripto, aut sine scripto: ut apud Græcos τῶν νόμων οἱ μὲν ἔγγραφοι, οἱ δὲ ἄγραφοι. Scriptum autem jus, est, lex, plebiscitum, senatus-consultum, principum placita, magistratuum edicta, responsa prudentum.

§ 3. *The* Roman *law is divided, like the* Grecian, *into written and unwritten. The written, consists of the plebiscites, the decrees of the senate, ordinances of princes, the edicts of magistrates, and the answers of the sages of the law.*

De lege et plebiscito.

§ IV. Lex est, quod populus Romanus, senatorio magistratu interrogante, (veluti consule,) constituebat. Plebiscitum est, quod plebs, plebeio magistratu interrogante, (veluti tribuno,) constituebat. Plebs autem a populo eo differt, quo species a genere; nam appellatione populi universi cives significantur, connumeratis etiam patriciis et senatoribus. Plebis autem appellatione, sine patriciis et senatoribus, cæteri cives significantur. Sed et plebiscita, lege Hortensia lata, non minus valere, quam leges, cœperunt.

§ 4. *A law is what the* Roman *people enact at the request of a senatorial magistrate; as a consul. A plebiscite is what the commonalty enact, when requested by a plebeian magistrate, as a tribune. The word commonalty differs from people, as a species from its genus; for all the citizens, including patricians and senators, are comprehended under the term people. The term commonalty, includes all the citizens, except patricians and senators. The plebiscites, by the* Hortensian *law, began to have the same force, as the laws themselves.*

De senatus-consulto.

§ V. Senatus-consultum est, quod senatus jubet atque constituit: nam, cum auctus esset populus Romanus in eum modum, ut difficile esset, in unum eum convocari legis sanciendæ causâ, æquum visum est, senatum vice populi consuli.

§ 5. *A senatorial decree is what the senate commands and appoints: for, when the people of* Rome *became so increased that it was difficult to assemble them for the enacting of laws, it seemed right, that the senate should be consulted instead of the people.*

De constitutione.

§ VI. Sed et, quod principi placuit, legis habet vigorem: cum lege regia, quæ de ejus imperio lata est, populus ei, et in eum, omne imperium suum et potestatem concedat. Quodcunque ergo imperator per epistolam constituit, vel cognoscens decrevit, vel edicto præcepit, legem esse constat. Hæc sunt, quæ constitutiones appellantur. Planè ex his quædam sunt personales, quæ nec ad exemplum trahuntur, quoniam non hoc princeps vult: nam quod alicui ob meritum indulsit, vel si quam pœnam irrogavit, vel si cui sine exemplo subvenit, personam non transgreditur. Aliæ autem, cum generales sint, omnes procul dubio tenent.

§ 6. *The ordinance of the prince hath also the force of a law; for the people by the* lex regia, *make a concession to him of their whole power. Therefore whatever the emperor ordains by rescript, decree, or edict, is law. Such acts are called constitutions. Of these, some are personal, and are not to be drawn into precedent; for, if the prince hath indulged any man on account of his merit, or inflicted any extraordinary punishment on a criminal, or granted some unprecedented assistance, these acts extend not beyond the individual. But other constitutions being general, undoubtedly bind all.*

De jure honorario.

§ VII. Prætorum quoque edicta non modicam obtinent juris auctoritatem. Hoc etiam jus honorarium solemus appellare: quod, qui honores gerunt, (id est magistratus,) auctoritatem huic juri dederunt. Proponebant et ædiles curules edictum de quibusdam causis; quod et ipsum juris honorarii portio est.

§ 7. *The edicts of the prætors are also of great authority. These edicts are called the honorary law, because the magistrates who bear honors in the state, have given them their sanction. The curule ædiles also, upon certain occasions, published their edicts, which became a part of the* jus honorarium.

De responsis prudentum.

§ VIII. Responsa prudentum sunt sententiæ et opiniones eorum, quibus permissum erat de jure respondere: nam antiquitùs constitutum erat, ut essent, qui jura publicè interpretarentur, quibus a Cæsare jus respondendi datum est, qui juris-consulti appellabantur: quorum omnium sententiæ et opiniones eam auctoritatem tenebant, ut judici recedere a responsis eorum non liceret, ut est constitutum.

§ 8. *The answers of the lawyers are the opinions of persons authorised to give answers on matters of law. For anciently, public Interpreters of the law were licenced by the emperors and were called* jurisconsulti; *and their opinions obtained so great an authority, that it was not in the power of a judge to recede from them.*

De jure non scripto.

§ IX. Sine scripto jus venit, quod usus approbavit; nam diuturni mores, consensu utentium comprobati, legem imitantur.

§ 9. *The unwritten law is that, which usage has approved: for daily customs, established by the consent of those who use them, put on the character of law.*

Ratio superioris divisionis.

§ X. Et non ineleganter in duas species jus civile distributum esse videtur; nam origo ejus ab institutis duarum civitatum, Athenarum scilicet et Lacedæmoniorum, fluxisse videtur. In his enim civitatibus, ita agi solitum erat, ut Lacedæmonii quidem ea, quæ pro legibus observabant, memoriæ mandarent: Athenienses verò ea, quæ in legibus scripta comprehendissent, custodirent.

§ 10. *Nor is it an inelegant division of the law, into written and unwritten: which seems to have taken rise from the peculiar customs of the* Athenians *and* Lacedemonians. *For the* Lacedemonians *trusted chiefly to memory, for the preservation of their laws; but the laws of the* Athenians *were committed to writing.*

Divisio juris in immutabile et mutabile.

§ XI. Sed naturalia quidem jura, quæ apud omnes gentes peræque observantur, divinâ quadam providentiâ constituta, semper firma atque immutabilia permanent. Ea

§ 11. *The laws of nature, observed by all nations, inasmuch as they are the appointment of divine providence, remain fixed and immutable. But the laws, which every city has enacted*

vero, quæ ipsa sibi quæque civitas constituit, sæpe mutari solent, vel tacito consensu populi, vel aliâ postea lege latâ.

for itself, suffer frequent changes, either by tacit consent of the people, or by some subsequent law.

De objectis juris.

§ XII. Omne autem jus, quo utimur, vel ad personas pertinet, vel ad res, vel ad actiones. Et prius de personis videamus: nam parùm est jus nosse, si personæ, quarum causâ constitutum est, ignorentur.

§ 12. *All laws, relate to persons, things, or actions. First then of persons; for it would be of little purpose to study the law, while ignorant of persons, for whose sake the law was constituted.*

TITULUS TERTIUS.

DE JURE PERSONARUM.

D. 1. T. 5.

Prima divisio personarum.

SUMMA itaque divisio de jure personarum hæc est: quod omnes homines aut liberi sunt, aut servi.

The first general division of persons, in respect to their rights, is into freemen and slaves.

Definitio libertatis.

§ I. Et libertas quidem (ex quâ etiam liberi vocantur) est naturalis facultas ejus, quod cuique facere libet, nisi quid vi aut jure prohibetur.

§ 1. *Freedom, from which we are denominated free, is the natural power of acting as we please, unless prevented by force, or by the law.*

Definitio servitutis.

§ II. Servitus autem est constitutio juris gentium, quâ quis dominio alieno contra naturam subjicitur.

§ 2. *Slavery, is when one man is subjected to the dominion of another, according to the law of nations, though contrary to natural right.*

Servi et mancipii etymologia.

§ III. Servi autem ex eo appellati sunt, quod imperatores captivos vendere, ac per hoc servare, nec occidere solent; qui etiam mancipia dicti sunt; eo, quod ab hostibus manu capiantur.

§ 3. *Slaves are denominated* servi, *from the practice of our generals to sell their captives, and thus preserve,* (servare) *and not slay them. Slaves are also called* mancipia *in that they are taken from the enemy by hand* (manucapti.)

Quibus modis servi constituuntur.

§ IV. Servi autem aut nascuntur, aut fiunt. Nascuntur ex ancillis nostris: fiunt aut jure gentium, id est, ex captivitate; aut jure civili, cum liber homo, major viginti annis, ad pretium participandum sese venundari passus est.

§ 4. *Slaves are born such, or become so. They are born such of bond-women: they become so either by the law of nations, that is, by captivity; or by the civil law; as when a free person, above the age of twenty, suffers himself to be sold, for the sake of sharing the price given for him.*

De liberorum et servorum divisione.

§ V. In servorum conditione nulla est differentia; in liberis autem multæ: aut enim sunt ingenui, aut libertini.

§ 5. *In the condition of slaves there is no diversity; but among free persons, there are many; thus, some are* ingenui, *or Freemen; others* libertini *or Freed Men.*

TITULUS QUARTUS.

DE INGENUIS.

C. vii. T. 14.

De ingenui definitione.

INGENUUS est is, qui statim, ut natus est, liber est; sive ex duobus ingenuis matrimonio editus est, sive ex libertinis duobus, sive ex altero libertino, et altero ingenuo.

A Freeman is one who is born free, by being born in matrimony, of parents, who are both free, or both freed; or of parents, one free, the other freed. But one born of a free

Sed et, si quis ex matre nascitur liberâ, patre verò servo, ingenuus nihilominus nascitur: quemadmodum, qui ex matre libera et incerto patre natus est: quoniam vulgò conceptus est. Sufficit autem, liberam fuisse matrem eo tempore, quo nascitur, licet ancilla conceperit: et, è contrario, si libera conceperit, deinde ancilla facta pariat, placuit eum, qui nascitur, liberum nasci: quia non debet calamitas matris ei nocere, qui in ventre est. Ex his illud quæsitum est, si ancilla prægnans manumissa sit, deinde ancilla postea facta pepererit, liberum an servum pariat? Et Martianus probat, liberum nasci: sufficit enim ei, qui in utero est, liberam matrem vel medio tempore habuisse, ut liber nascatur; quod et verum est.

mother, altho' the father be a slave, or unknown, is free: notwithstanding he was conceived discreditably. And if the mother is free at the time of the birth, although a bond-woman when she conceived, the infant will be free. Also if a woman, free at conception, becomes a slave and is delivered, her child, is nevertheless free born; for the misfortune of the mother ought not to prejudice her unborn infant. It has been a question, whether the child of a woman, who is made free during pregnancy, but becomes bond before delivery, would be free born? Martianus proves the affirmative; for, he deems it sufficient to the unborn child, if the mother hath been free at any time between conception and delivery; and this is true.

De erronea ingenui manumissione.

§ I. Cum autem ingenuus aliquis natus sit, non officit ei, in servitute fuisse, et postea manumissum esse: sæpissimè enim constitutum est, natalibus non officere manumissionem.

§ 1. *It will not injure a man born free to have been in servitude, and afterwards manumitted: for it hath been often settled that manumission shall not prejudice free birth.*

TITULUS QUINTUS.

DE LIBERTINIS.

Definitio et origo libertinorum et manumissionis.

LIBERTINI sunt, qui ex justâ servitute manumissi sunt. Manumissio autem est *de manu datio:*

Freed men are those, who have been manumitted from just servitude. Manumission, manu-datio, *implies*

quamdiu aliquis in servitute est, manui et potestati suppositus est : et manumissus liberatur à domini potestate : quæ res a jure gentium orinem sumpsit ; utpote cum jure naturali omnes liberi nascerentur ; : esset nota manumissio, cùm servus esset incognita. Sed, postquam jure [illegible] servitus ingenuitatem [illegible]vasit, secutum est beneficium manumissionis : et, cum uno communi nomine omnes homines appellarentur, jure gentium tria hominum genera esse cœperunt : liberi ; et his contrarium, servi ; et tertium genus, libertini ; qui desierant esse servi.

the giving of liberty ; for whoever is in servitude, is subject to the hand and power of another ; but whoever is manumitted, is free from both.

Manumission took its rise from the law of nations ; for all men by the law of nature are born free ; nor was manumission heard of while servitude was unknown. But when servitude, under sanction of the law of nations, invaded liberty, the benefit of manumission became then a consequence. For all men at first were denominated by one common appellation, 'till, by the law of nations, they began to be divided into three classes, viz. *into* liberi, *or freemen,* servi, *or slaves, and* libertini, *freedmen, who have ceased to be slaves.*

Quibus modis manumittatur.

§ I. Multis autem modis manumissio procedit : aut enim ex sacris constitutionibus in sacrosanctis ecclesiis, aut vindictâ, aut inter amicos, aut per epistolam, aut per testamentum, aut per aliam quamlibet ultimam voluntatem. Sed et aliis multis modis libertas servo competere potest, qui tam ex veteribus, quam ex nostris constitutionibus, introducti sunt.

§ 1. *Manumission is effected by various ways ; either in the face of the church, according to the imperial constitutions, or by the* vindicta, *or in the presence of friends, or by letter, or by testament, or by any other last will. Liberty may also be conferred upon a slave by diverse other methods, some of which were introduced by former laws, and others by our own.*

Ubi et quando manumitti potest.

§ II. Servi vero à dominis semper manumitti solent, adeo ut vel in transitu manumittantur ; veluti cum prætor, aut præses, aut proconsul, in balneum, vel in theatrum eunt.

§ 2. *Slaves may be manumitted by their masters at any time ; even on the way, as while the prætor, the governor of a province, or the proconsul is going to the baths, or to the theatre.*

De libertinorum divisione sublata.

§ III. Libertinorum autem status tripertitus antea fuerat: nam, qui manumittebantur, modo majorem et justam libertatem consequebantur, et fiebant cives Romani; modo minorem, et Latini ex lege Junia Norbana fiebant; modo inferiorem, et fiebant ex lege Ælia Sentia Dediticii: sed quoniam Dediticiorum quidem pessima conditio, jam ex multis temporibus in desuetudinem abierat; Latinorum vero nomen non frequentabatur; ideoque nostra pietas, omnia augere et in meliorem statum reducere desiderans, duabus constitutionibus hoc emendavit, et in pristinum statum reduxit: quia et à primis urbis Romæ cunabulis una atque simplex libertas competebat, id est, eadem, quam, habebat manumissor; nisi quod, scilicet, libertinus sit, qui manumittitur, licet manumissor ingenuus sit: et Dediticios quidem per constitutionem nostram expulimus, quam promulgavimus inter nostras decisiones; per quas, suggerente nobis Triboniano viro excelso quæstore nostro, antiqui juris altercationes placavimus. Latinos autem Junianos, et omnem, quæ circa eos fuerat, observantiam, alia constitutione, per ejusdem quæstores suggestionem, correximus, quæ inter imperiales radiat sanctiones; et omnes libertos, (nullo, nec ætatis manumissi, nec domini manumittentis, nec in manumissionis modo, discrimine habito, sicuti antea observabatur,) civitate Romani decoravimus, multis mo-

§ 3. *Freedmen were formerly distinguished by a threefold division. Those, who were manumitted, sometimes obtained the greater liberty, and became* Roman *citizens; sometimes only the lesser, and became* Latins, *under the law* Junia Norbana; *and sometimes only the inferior liberty, and became* Dediticii, *by the law* Ælia Sentia. *But, the condition of the* Dediticii *differing but little from slavery, has been long disused; neither has the name of* Latins *been frequent. Our piety therefore, leading us to reduce all things into a better state, we have amended our laws by two constitutions, and re-established the antient usage; for antiently liberty was simple and undivided; that is, it was conferred upon the slave, as his manumittor possessed it; admitting this single difference, that the person manumitted became only a Freedman, although his manumittor was a Freeman.*

We have abolished the Dediticii *by a constitution published among our decisions, by which, at the instance of* Tribonian, *our Quæstor, we have suppressed all disputes concerning the antient law. We have also, at his suggestion, altered the condition of the* Latins, *and corrected the laws, which related to them, by another constitution, conspicuous among the imperial sanctions: and we have made all the freed-men in general citizens of* Rome, *regarding neither the age of the manumitted, nor of the manumittor, nor the antient forms of*

Legendum Digestis
de Latinis 4 Inst. 17
Cum 4 Kal. 18

dis additis, per quos possit libertas servis cum civitate Romana, quæ nola est in præsenti, præstari.

manumission. We have also introduced many new methods, by which slaves may become Roman *citizens; the only liberty that can now be conferred.*

TITULUS SEXTUS.

QUI ET EX QUIBUS CAUSIS, MANUMITTERE NON POSSUNT.

D. xl. T. 9. C. vii. T. 11.

Prius caput legis Æliæ Sentiæ, de manumittente in fraudem creditorum.

NON tamen cuicunque volenti manumittere licet: nam is, qui in fraudem creditorum manumittit, nihil agit: quia lex Ælia Sentia impedit libertatem.

Every master may not manumit at will: for if done with intent to defraud his creditors, it is void. The law Ælia Sentia *restraining this liberty.*

De servo instituto cum libertate.

§ 1. Licet autem domino, qui solvendo non est, in testamento servum suum cum libertate hæredem instituere, ut liber fiat, hæresque ei solus et necessarius, si modo ei nemo alius, ex eo testamento, hæres extiterit: aut quia nemo hæres scriptus sit, aut quia is, qui scriptus est, quâlibet ex causâ hæres ei non extiterit. Idque eâdem lege Ælia Sentia provisum est, et rectè. Valdè enim prospiciendum erat, ut egentes homines, quibus alius hæres extiturus non esset, vel servum suum necessarium hæredem haberent, qui satisfacturus esset creditoribus: aut,

§ 1. *A master, who is insolvent, may appoint a slave to be his heir with liberty, that thus the slave may obtain his freedom, and become the only and necessary heir of the testator, provided no other person is also heir by the same testament; and this may happen, either because no other person was instituted heir or because the person, so instituted, is unwilling to act. This privilege of masters was for wise reasons established by the law* Ælia Sentia: *for it became necessary to provide, that indigent men, to whom no man would be a voluntary heir, might have a slave for a neces-*

hoc eo non faciente, creditores res hæreditarias servi nomine vendant, ne injuriâ defunctus afficiatur.

sary heir to satisfy creditors; or that the creditors should sell the hereditary effects in the name of the slave, lest the deceased should suffer ignominy.

De servo instituto sine libertate.

§ II. Idemque juris est, etsi sine libertate servus hæres institutus est; quod nostra constitutio non solùm in domino, qui solvendo non est, sed generaliter constituit, nova humanitatis ratione; ut ex ipsâ scripturâ institutionis etiam libertas ei competere videatur: cum non sit verisimile, eum, quem hæredem sibi elegit, si prætermiserit libertatis dationem, servum remanere voluisse, et neminem sibi hæredem fore.

§ 2. *A slave also becomes free by being instituted an heir, although his freedom be not mentioned: for our constitution respects not only the insolvent master, but, by a new act of humanity, it extends generally; so that the institution of an heir, implies the grant of liberty. For it is highly improbable, that a testator, although he has omitted to mention liberty in his will, could mean that the person instituted, should remain a slave, and himself be destitute of an heir.*

Quid sit in fraudem creditorum manumittere.

§ III. In fraudem autem creditorum manumittere videtur, qui vel jam eo tempore, quo manumittit, solvendo non est; vel qui, datis libertatibus, desiturus est solvendo esse. Prevaluisse tamen videtur, nisi animum quoque fraudandi manumissor habuerit, non impediri libertatem, quamvis bona ejus creditoribus non sufficiant: sæpe enim de facultatibus suis ampliùs, quam in his est, sperant homines. Itaque tunc intelligimus impediri libertatem, cum utroque modo fraudantur creditores; id est, et consilio manumittentis, et ipsâ re; eo quod bona ejus non sunt suffectura creditori-

§ 3. *Manumission is in fraud of creditors, if the master is insolvent, when he manumits, or becomes so by manumitting. It is however the prevailing opinion, that liberty, when granted, is not impeached, unless the manumittor meant to defraud, although his goods are insufficient for the payment of his creditors; for men frequently hope better, than their circumstances really are. We therefore understand liberty to be then only impeded, when creditors are doubly defrauded: by the intention of the manumittor, and in reality.*

Alterum caput legis Æ iæ Sentiæ de minore viginti annis.

§ IV. Eadem lege Ælia Sentia, domino minori viginti annis non aliter manumittere permittitur, quam si vindictâ apud consilium, justâ causâ manumissionis approbata, fuerint manumissi.

§ 4. *By the same law* Ælia Sentia, *a master, under the age of twenty years, cannot manumit, unless for some good reason, to be approved by a council; and then by the* vindicta.

Quæ sunt justæ causæ manumissionis.

§ V. Justæ autem causæ manumissionis sunt: veluti si quis patrem aut matrem, filium filiamve, aut fratres, sororesve naturales, aut pædagogum, aut nutricem, aut educatorem, aut alumnum alumnamve, aut collactaneum manumittat; aut servum, procuratoris habendi gratiâ; aut ancillam, matrimonii habendi causâ; dum tamen infra sex menses in uxorem ducatur, nisi justa causa impediat: et servus, qui manumittitur, procuratoris habendi gratiâ, non minor decem et septem annis manumittatur.

§ 5. *Just reasons for manumission, are that the person to be manumitted is father or mother to the manumittor, his son or daughter, his brother or sister, his preceptor, his nurse, his foster child, or his foster brother; or to constitute him his proctor; or his bond-woman, with an intent to marry her, provided the marriage is performed within six months. But a slave who is to be constituted proctor, cannot be manumitted for that purpose, if under seventeen.*

De causa semel probata.

§ VI. Semel autem causa approbata, sive vera sit, sive falsa, non retractatur.

§ 6. *A reason once admitted in favor of liberty, be it true or false, cannot be recalled.*

Abrogatio posterioris capitis legis Æliæ Sentiæ.

§ VII. Cum ergo certus modus manumittendi minoribus viginti annis dominis per legem Æliam Sentiam constitutus esset, eveniebat, ut, qui quatuordecem annos expleverat, licet testamentum facere, et in eo sibi hæredem instituere, legataque relinquere, posset, tamen, si adhuc minor esset viginti annis, libertatem servo dare non posset; quod non erat ferendum: nam, cui toto-

§ 7. *When certain bounds were prescribed by the law* Ælia Sentia *to all minors under twenty, with regard to manumission, it was observed, that any person, who had compleated fourteen years, might make a testament, institute an heir, and bequeath legacies, and yet that no person, under twenty, could confer liberty; which was not longer to be tolerated: for can any just cause be assigned, why a man,*

rum suorum bonorum in testamento dispositio data erat, quare non similiter ei, quemadmodum alias res, ita et de servis suis in ultimâ voluntate disponere, quemadmodum voluerit, permittimus, ut et libertatem eis possit præstare? Sed cum libertas inæstimabilis res sit, et propter hoc ante vigesimum ætatis annum antiquitas libertatem servo dare prohibebat; ideo nos, mediam quodammodo viam eligentes, non aliter minori viginti annis libertatem in testamento dare servo suo concedimus, nisi septemdecimum annum impleverit, et octodecimum attigerit. Cum enim antiquitas hujusmodi ætati et pro aliis postulare concesserit, cur non etiam sui judicii stabilitas ita eos adjuvare credatur, ut ad libertatem dandam servis suis possint pervenire?

permitted to dispose of all his effects, by testament, should be debarred from enfranchising his slaves? But liberty being of inestimable value, and our ancient laws prohibiting any person to make a grant of it, who is under twenty years of age, we therefore make choice of a middle way, and permit all, who have attained their eighteenth year, to confer liberty by testament. For since, by former practice, persons at eighteen years of age were permitted to plead for their clients, there is no reason, why the same stability of judgment, which qualifies them to assist others, should not enable them to be of service to themselves also, by having the liberty of enfranchising their own slaves.

TITULUS SEPTIMUS.

DE LEGE FUSIA CANINIA TOLLENDA.

C. vii. T. 3.

LEGE Fusia Caninia, certus modus constitutus erat in servis testamento manumittendis; quam, quasi libertates impedientem et quodammodò invidam, tollendam esse censuimus: cum satis fuerat inhumanum, vivos quidem licentiam habere totam suam familiam libertatem donare, nisi alia causa impediat libertatem; morientibus autem hujusmodi licentiam adimere.

By the law Fusia Caninia, *masters were limited in manumitting by testament; we have thought proper to abrogate this law as odious and destructive of liberty; judging it inhuman, that persons in health should have power to manumit a whole family, if no just cause forbid, and that the dying should be prohibited from doing the same.*

†TITULUS OCTAVUS.

DE HIS, QUI SUI VEL ALIENI JURIS SUNT.

D. 1. T. 6.

Altera divisio personarum.

SEQUITUR de jure personarum alia diviso; nam quædam personæ sui juris sunt, quædam alieno juri subjectæ. Rursus earum, quæ alieno juri subjectæ sunt, aliæ sunt in potestate parentum, aliæ in potestate dominorum. Videamus itaque de his, quæ alieno juri subjectæ sunt; nam, si cognoverimus, quænam istæ personæ sunt, simul intelligemus, quæ sui juris sunt; ac priùs inspiciamus de his, quæ in potestate dominorum sunt.

We now proceed to another division of persons; for some are independent, and some are subject to the power of others. Of those, who are subject to others, some are in the power of parents, others of their masters. Let us then inquire, who are in subjection to others; for, when we shall ascertain these, we shall at the same time discover, who are independent. And first of those, who are in the power of masters.

De jure gentium in servos.

§ I. In potestate itaque dominorum sunt servi, quæ quidem potestas juris gentium est; nam apud omnes peræque gentes animadvertere possumus, dominis in servos vitæ necisque potestatem fuisse: et, quodcunque per servum acquiritur, id domino acquiri.

§ 1. *All slaves are in the power of their masters, a power derived from the law of nations: for it is observable among all nations, that masters have always had the power of life and death over their slaves, and that whatever the slave acquires, is acquired for the master.*

De jure civium Romanorum in servos.

§ II. Sed hoc tempore nullis hominibus, qui sub imperio nostro sunt, licet, sine causâ legibus cognitâ, in servos suos supra modum sævire. Nam, ex constitutione divi Antonini, qui sine causâ servum suum occiderit, non minus puniri jubetur, quam si alienum servum occiderit. Sed et major asperitas

§ 2. *All our subjects are now forbidden to inflict any extraordinary punishment upon their slaves, without legal cause. For, by a constitution of* Antoninus, *whoever causelessly kills his own slave, is to be punished equally as if he had killed the slave of another. The too great severity of masters is also restrained*

dominorum, ejusdem principis constitutione, coercetur: nam Antoninus, consultus à quibusdam præsidibus provinciarum de his servis, qui ad ædem sacram vel statuam principum confugiunt, præcepit, ut, si intolerabilis videatur sævitia dominorum, cogantur servos suos bonis conditionibus vendere, ut pretium dominis daretur; et rectè: expedit enim reipublicæ, ne suâ re quis male utatur. Cujus rescripti, ad Ælium Martianum missi, verba sunt hæc. *Dominorum quidem potestatem in servos illibatam esse oportet, nec cuiquam hominum jus suum detrahi. Sed et dominorum interest, ne auxilium contra sævitiam, vel famem, vel intolerabilem injuriam, denegetur iis, qui juste deprecantur. Ideoque cognosce de querelis eorum, qui ex familia Julii Sabini ad sacram statuam confugerunt; et, si vel durius habitos, quam æquum est, vel infami injuria affectos esse, cognoveris, venire jube; ita ut in potestatem domini non revertantur: quod si meæ constitutioni fraudem fecerit, sciat, me hoc admissum adversus se severius executurum.*

by another constitution of Antoninus *who being consulted by certain governors of provinces concerning slaves, who take sanctuary either in temples, or at the statues of the emperors,* Ordained, *that if the severity of masters should appear excessive, they might be compelled to make sale of their slaves upon equitable terms, so that the masters might receive the value; and properly; inasmuch as it is for the public good, that no one should be permitted to misuse even his own property. The words of this rescript, sent to* Ælius Martianus, *are these.*—The power of masters over their slaves ought to be protected: nor ought any man to be deprived of his just right. But it is for the interest of all masters, that relief against cruelties, the denial of sustenance, or any other insufferable injury, should be granted to those who justly implore it. Therefore look into the complaints made by the family of *Julius Sabinus*, whose slaves took sanctuary at the sacred statue; and, if proof be made that they have been too hardly treated, or greatly injured, order them to be forthwith sold, so that they be no longer subject to their former master: and, if *Julius Sabinus* attempt to evade our constitution, let him know, that I shall put it in force against him with more severity.

TITULUS NONUS.

DE PATRIA POTESTATE.

C. viii. T. 47.

Summa tituli.

IN potestate nostrâ sunt liberi nostri, quos ex justis nuptiis procreavimus.

Our children, begotten in lawful wedlock, are under our power.

Definitio nuptiarum.

§ I. Nuptiæ autem, sive matrimonium, est, viri et mulieris conjunctio, individuam vitæ consuetudinem continens.

§ 1. *Matrimony is a connection between a man and woman, implying a mutual and exclusive cohabitation during life.*

Qui habent in potest te.

§ II. Jus autem potestatis, quod in liberos habemus, proprium est civium Romanorum; nulli enim alii sunt homines, qui talem in liberos habeant potestatem, qualem nos habemus.

§ 2. *The power which we have over our children is peculiar to the citizens of* Rome ; *for no other people have the same power over their children, which we have over ours.*

Qui sunt in potestate.

§ III. Qui igitur ex te et uxore tuâ nascitur, in tuâ potestate est. Item qui ex filio tuo et uxore ejus nascitur, id est, nepos tuus et neptis, æque in tuâ sunt potestate : pronepos, et proneptis, et deinceps cæteri. Qui autem ex filiâ tuâ nascuntur, in potestate tuâ non sunt; sed in patris eorum.

§ 3. *The child of you and your wife, is under your power. The issue of your son and son's wife, that is, your grand-sons or grand-daughters are equally so; so are your great grand-children, &c. But children born of a daughter are not in your power, but in the power of their father, or grand father.*

TITULUS DECIMUS.

DE NUPTIIS.

D. xxiii. T. 2. C. v. T. 4. Nov. 74.

Qui possunt nuptias contrahere.

JUSTAS autem nuptias inter se cives Romani contrahunt, qui secundum præcepta legum coeunt, masculi quidem puberes, fœminæ autem viri potentes; sive patres familiarum sint; sive filii familiarum; dum tamen, si filii familiarum sint, consensum habeant parentum, quorum in potestate sunt: nam, hoc fieri debere, et civilis et naturalis ratio suadet, in tantum, ut jussus parentis præcedere debeat. Unde quæsitum est, an furiosi filia nubere, aut furiosi filius uxorem ducere, possit? Cumque super filio variabatur, nostra processit decisio, quâ permissum est ad exemplum filiæ furiosi, filium quoque furiosi posse, et sine patris interventu, matrimonium sibi copulare, secundùm datum ex nostrâ constitutione modum.

The citizens of Rome *contract valid matrimony, when they follow the precepts of the law; males, when they arrive at puberty, and females, when they attain to a marriageable age. The males, whether* patres familiarum, *fathers of a family, or* filii familiarum, *sons of a family; but, if they are sons of a family, they must first obtain the consent of the parents, under whose power they are. For reason, both natural and civil, convinces us, that the consent of parents should precede marriage; hence arose the question, whether the son of a madman could contract matrimony? But opinions being various, we decided that the son, as well as the daughter of a madman, may marry without intervention of the father, provided the rules of our constitution are observed.*

Quæ uxores duci possunt vel non. De cognatis, ac primum de parentibus et liberis.

§ I. Ergo non omnes nobis uxores ducere licet: nam à quarundam nuptiis abstinendum est: inter eas enim personas, quæ parentum liberorumve locum inter se obtinent, contrahi nuptiæ non possunt; veluti interpatrem et filiam, vel avum et neptem, vel matrem et filium, vel a-

§ 1. *We may not marry any woman; for with some, marriage is forbidden. Matrimony must not be contracted between parents and their children, as between a father and daughter, a grandfather and his grand-daughter, a mother and her son, a grand-mother and her grand-*

viam et nepotem, et usque in infinitum: et, si tales personæ inter se coierent, nefarias atque incestas nuptias contraxisse dicuntur: et hæc adeò vera sunt, ut, quamvis per adoptionem parentum liberorumve loco sibi esse cœperint, non possunt inter se matrimonio jungi; in tantum, ut etiam, dissolutâ adoptione, idem juris maneat. Itaque eam, quæ tibi per adoptionem filia vel neptis esse cœperit, non poteris uxorem ducere, quamvis eam emancipaveris.

son; and so on (in a right line) to infinitum. And, if such persons cohabit, they are truly said to have contracted a criminal and incestuous marriage; inasmuch as those, who only hold the place of parents and children by adoption, cannot intermarry; and the same law remains even after the adoption is dissolved. You cannot therefore take to wife one who hath been either your adopted daughter or granddaughter, although you may have emancipated her.

De fratribus et sororibus.

§ II. Inter eas quoque personas, quæ ex transverso gradu cognationis junguntur, est quædam similis observatio, sed non tanta. Sanè enim inter fratrem sororemque nuptiæ prohibitæ sunt, sive ab eodem patre eâdemque matre nati fuerint, sive ab altero eorum. Sed, si qua per adoptionem soror tibi esse cœperit, quamdiu quidem constat adoptio, sanè inter te et eam nuptiæ consistere non possunt; cum verò per emancipationem adoptio sit dissoluta, poteris eam uxorem ducere: sed et si tu emancipatus fueris, nihil est impedimento nuptiis. Et ideo constat, si quis generum adoptare velit, debere eum antea filiam suam emancipare: et si quis, velit nurum adoptare, debere eum antea filium suum emancipare.

§ 2. *Matrimony is also prohibited between collaterals, but not so extensively. A brother and sister are forbidden to marry, whether they are the children of the same father and mother, or of either. And, if a woman becomes your sister by adoption, so long as that subsists, no marriage may be contracted between you. But, when the adoption is destroyed by emancipation, you may take her to wife. Also, if you should be emancipated, there will then remain no impediment, although your sister by adoption is not so. Hence if a man would adopt his son-in-law, he should first emancipate his daughter, and whoever would adopt his daughter-in-law, should previously emancipate his son.*

De fratris et sororis filia vel nepte.

§ III. Fratris verò vel sororis filiam uxorem ducere non licet: sed

§ 3. *It is unlawful to marry the daughter or grand-daughter of a*

nec neptem fratris vel sororis quis ducere potest, quamvis quarto gradu sint: cujus enim filiam ducere non licet, neque ejus neptem permittitur. Ejus verò mulieris, quam pater tuus adoptavit, filiam non videris prohiberi uxorem ducere: quia neque naturali, neque civili, jure tibi conjungitur.

brother, or a sister; although the last are in the fourth degree. For when we are prohibited to take the daughter of any person in marriage, we are also prohibited to take his grand-daughter. But it does not appear that there is any impediment against the marriage of a son with the daughter of her, whom his father hath adopted; for they bear no relation to each other, natural or civil.

De consobrinis.

§ IV. Duorum autem fratrum vel sororum liberi, vel fratris et sororis, conjungi possunt.

§ 4. *The children of two brothers,* (Patrueles) *or two sisters,* (sobrini) *or of a brother and sister,* (Consobrini) *may be joined in matrimony. (Such are cousins.)*

De amitâ, materterâ, amitâ magnâ, materterâ magnâ.

§ V. Item amitam, licet adoptivam, ducere uxorem non licet; item nec materteram: quia parentum loco habentur. Quâ ratione verum est, magnam quoque amitam, et materteram magnam, prohiberi uxorem ducere.

§ 5. *A man may not marry his aunt either on the father's or the mother's side, although she is only so by adoption; because they are regarded as representatives of parents. For the same reason no person may marry his great-aunt, either on his father's, or mother's side.*

De affinibus, et primùm de privignâ et nuru.

§ VI. Affinitatis quoque veneratione, à quarundam nuptis abstinere necesse est: ut ecce privignam aut nurum ducere non licet: quia utræque filiæ loco sunt: quod ita scilicet accipi debet, si fuit nurus aut privigna tua. Nam, si adhuc nurus tua est, id est, si adhuc nupta est filio tuo, aliâ ratione uxorem ejus ducere non poteris: quia eadem duobus nupta esse non potest.

§ 6. *We must abstain from certain marriages, through regard to affinity; as with a wife's daughter, or a son's wife, for they are both in the place of daughters: and this rule must be so understood as to include those, who have been, our daughters-in-law. For marriage with a son's wife, while she continues so, is prohibited on another account, viz. because she can not be the wife of two*

Item si adhuc privigna tua est, id est, si mater ejus tibi nupta est, ideo eam uxorem ducere non poteris, quia duas uxores eodem tempore habere non licet.

at the same time. And the marriage of a man with his wife's daughter, while her mother continues to be his wife, is also prohibited, because it is unlawful to have two wives at once.

De socru et novercâ.

§ VII. Socrum quoque et novercam prohibitum est uxorem ducere; quia matris loco sunt: quod et ipsum, dissolutâ demum affinitate, procedit: alioquin, si adhuc noverca est, id est, si adhuc patri tuo nupta est, communi jure impeditur tibi nubere, quia eadem duobus nupta esse non potest. Item si adhuc socrus est, id est, si adhuc filia ejus tibi nupta est, ideo impediuntur tibi nuptiæ, quia duas uxores habere non potes.

§ 7. *A man is forbidden to marry his wife's mother, and his father's wife, because they both hold the place of mothers; and this, although the affinity is dissolved: besides a father's wife, while she continues to be so, may not marry, because no woman can have two husbands at the same time. Nor can a man marry his wife's mother, her daughter continuing his wife, because it is against the law to have two wives.*

De comprivignis.

§ VIII. Mariti tamen filius ex aliâ uxore, et uxoris filia ex alio marito, vel contrà, matrimonium rectè contrahunt; licet habeant fratrem sororemve ex matrimonio postea contracto natos.

§ 8. *The son of a husband by a former wife, and the daughter of a wife by a former husband, and* e contra, *(the daughter of an husband by a former wife and the son of a wife by a former husband) may lawfully contract matrimony, even though a brother or sister is born of such second marriage between their respective parents.*

De quasi privignâ, quasi nuru, et quasi novercâ.

§ IX. Si uxor tua post divortium ex alio filiam procreavit, hæc non est quidem privigna tua: sed Julianus ab hujusmodi nuptiis abstineri debere ait: nam constat, nec sponsam filii nurum esse, nec patris sponsam novercam esse: rectiùs ta-

§ 9. *The daughter of a divorced wife by a second husband, is not daughter-in-law to the first husband. But* Julian *says we ought to abstain from such nuptials. It is also evident, that the* espoused *wife of a son, is not a daughter-in-law to*

men et jure facturos eos, qui ab hujusmodi nuptiis abstinuerint.

his father; and that the espoused *wife of a father, is not a step-mother to his son: but it is right to abstain from such nuptials.*

De servili cognatione.

§ X. Illud certum est, serviles quoque cognationes impedimento nuptiis esse, si forte pater et filia, aut frater et soror, manumissi fuerint.

§ 10. *It is clear that servile cognation is an impediment to matrimony; as when a father and daughter, or a brother and sister, are manumitted.*

De reliquis prohibitionibus.

§ XI. Sunt et aliæ personæ, quæ propter diversas rationes nuptias contrahere prohibentur, quas in libris digestorum seu pandectarum, ex jure veteri collectarum, enumerari permisimus.

§ 11. *There are other persons also, who, for diverse reasons, may not intermarry: we have caused these to be enumerated in the digests collected from the old law.*

De pœnis injustarum nuptiarum.

§ XII. Si adversus ea, quæ diximus, aliqui coierint, nec vir, nec uxor, nec nuptiæ, nec matrimonium, nec dos intelligitur. Itaque ii, qui ex eo coitu nascuntur in potestate patris non sunt: sed tales sunt (quantum ad patriam potestatem pertinent) quales sunt ii, quos mater vulgò concepit. Nam nec hi patrem habere intelliguntur, cum et iis pater incertus sit; unde solent *spurii* appellari, παρα των σπορων et ἀπατορες; quasi sine patre filii. Sequitur ergò, ut, dissoluto tali coitu, nec dotis, nec donationis exactioni locus sit. Qui autem prohibitas nuptias contrahunt, et alias pœnas patiuntur, quæ sacris constitutionibus continentur.

§ 12. *If persons cohabit in contempt of the rules thus laid down, they shall not be deemed husband and wife, nor shall their marriage, or any portion given on account thereof, be valid; and the children, born in such cohabitation, shall not be under the power of the father. For, in respect to paternal power, they resemble the children of a common woman, who are looked upon as having no father, because it is uncertain who he is. They are therefore called in Latin* spurii, *and in Greek* apatores; *i. e. without a father: hence, after the dissolution of such a marriage, no portion, or gift,* propter nuptias, *can legally be claimed. They who contract such prohibited matrimony, must undergo the farther punishments set forth in our constitutions.*

De legitimatione.

§ XIII. Aliquando autem evenit, ut liberi, qui statim, ut nati sunt, in potestate parentum non sunt, postea redigantur in potestatem patris: qualis est is, qui dum naturalis fuerat, postea curiæ datus, potestati patris subjicitur: nec non is, qui à muliere liberâ procreatus, cujus matrimonium minimè legibus interdictum fuerat, sed ad quam pater consuetudinem habuerat, postea, ex nostrâ constitutione dotalibus instrumentis compositis, in potestate patris efficitur. Quod et aliis liberis, qui ex eodem matrimonio fuerint procreati, similiter nostra constitutio præbuit.

§ 13. *It sometimes happens, that children who at their birth were not under the power of their parents, are reduced under it afterwards. Thus a natural son, who is made a Decurion, becomes subject to his father's power: and he who is born of a free-woman, with whom marriage is not prohibited, will likewise become subject to the power of his father, as soon as the marriage instruments are drawn, as our constitution directs; which allows the same benefits to those, who are born before marriage, as to those, who are born subsequent to it.*

TITULUS UNDECIMUS.

DE ADOPTIONIBUS.

D. 1. T. 7. C. viii. T. 48.

Continuatio.

NON solùm autem naturales liberi, secundum ea, quæ diximus, in potestate nostrâ sunt; verùm etiam ii, quos adoptamus.

It appears from what has been said, not only that all natural (legitimate) children are subject to paternal power, but those also, whom we adopt.

Divisio adoptionis.

§ I. Adoptio autem duobus modis fit, aut principali rescripto, aut imperio magistratûs. Imperatoris auctoritate adoptare quis potest eos, easve, qui, quæve, sui juris sunt, quæ species adoptionis dicitur *arro-*

§ 1. *Adoption is made two ways, either by imperial rescript or authority of the magistrate. The imperial rescript impowers us to adopt persons of either sex, who are* sui juris; *(*i. e. *independent) and this species*

gatio. Imperio magistratûs adoptamus eos easve, qui quæve in potestate parentum sunt; sive primum gradum liberorum obtineant, qualis est filius, filia; sive inferiorem, qualis est nepos, neptis, pronepos, proneptis.

of adoption is called arrogation. *But it is by the authority of the magistrate, that we adopt persons actually under the power of their parents, whether they are in the first degree, as sons and daughters; or in an inferior degree, as grand-children or great grand-children.*

Qui possunt adoptare filium-familias, vel non.

§ II. Sed hodiè, ex nostrâ constitutione, cum filius-familias à patre naturali extraneæ personæ in adoptionem datur, jura patris naturalis minimè dissolvuntur; nec quicquam ad patrem adoptivum transit, nec in potestate ejus est: licet ab intestato jura successionis ei à nobis tributa sint. Si verò pater naturalis non extraneo, sed avo filii sui materno; vel si ipse pater naturalis fuerit emancipatus, etiam avo vel proavo simili modo paterno vel materno filium suum dederit in adoptionem; in hoc casu, quia concurrunt in unam personam et naturalia et adoptionis jura, manet stabile jus patris adoptivi, et naturali vinculo copulatum, et legitimo adoptionis modo constitutum, ut et in familiâ et in potestate hujusmodi patris adoptivi sit.

§ 2. *But now, by our constitution, when the son of a family is given in adoption by his natural father to a stranger, the power of the natural father is not dissolved, neither does any thing pass to the adoptive father, nor is the adopted son in his power, although we allow such son, the right of succession to his adoptive father dying intestate. But if a natural father should give his son in adoption, not to a stranger, but to the maternal grandfather of such son; or if a natural father, who has been emancipated, should give his son, begotten after emancipation to his paternal or maternal grandfather or great-grandfather, in this case, the rights of nature and adoption concurring, the power of the adoptive father is established both by natural ties and legal adoption, so that the adopted son would be not only in the family, but under the power of his adoptive father.*

De arrogatione impuberis.

§ III. Cum autem impubes per principale rescriptum arrogatur, causâ cognitâ, arrogatio fieri permittitur: et exquiritur causa arrogationis, an honesta sit, expediatque

§ 3. *When any one, not arrived at puberty, is arrogated by the imperial rescript, inquiry is first made, whether the arrogation be justly founded, and expedient for the pupil:*

pupillo? et cum quibusdam conditionibus arrogatio fit; id est, ut caveat arrogator personæ publicæ, si intra pubertatem pupillus decesserit, restituturum se bona illis, qui, si adoptio facta non esset, ad successionem ejus venturi essent. Item non aliter emancipare eum potest arrogator, nisi, causâ cognitâ, dignus emancipatione fuerit; et tunc sua bona ei reddat. Sed et, si decedens pater eum exhæredaverit, vel vivus sine justâ causâ emancipaverit, jubetur quartam partem ei bonorum suorum relinquere; videlicet, præter bona, quæ ad patrem adoptivum transtulit, et quorum commodum ei postea acquisivit.

for such arrogation is always made on certain conditions; the arrogator is obliged to give caution before a public notary, thereby binding himself, if the pupil should die within the age of puberty, to restore all the property of such pupil to those who would have succeeded him, if no adoption had been made. The arrogator also may not emancipate, unless on legal proof, that his arrogated son deserves emancipation; and even then he must restore the property belonging to such son. Also if a father, upon his death-bed, hath disinherited his arrogated son, or when in health hath emancipated him, without just cause, he is commanded to leave the fourth part of all his goods to the son, besides what the son brought to him at the time of arrogation, and acquired for him afterwards.

De ætate adoptantis et adoptati.

§ IV. Minorem natu majorem non posse adoptare placet: adoptio enim naturam imitatur; et pro monstro est, ut major sit filius, quam pater. Debet itaque is, qui sibi filium per adoptionem aut arrogationem facit, plenâ pubertate [id est, decem et octo annis] præcedere.

§ 4. *A junior cannot adopt a senior; for adoption imitates nature; and it seems unnatural, that a son should be older than his father. He therefore, who would either adopt or arrogate, should be senior by full puberty, that is, by eighteen years.*

De adoptione in locum nepotis vel neptis, vel deinceps.

§ V. Licet autem et in locum nepotis vel neptis, pronepotis vel proneptis, vel deinceps, adoptare, quamvis filium quis non habeat.

§ 5. *It is lawful to adopt a person either as a grand-son or grand-daughter, great grand-son or great grand-daughter, or in a more distant degree, although the adoptor hath no son.*

De adoptione filii alieni in locum nepotis, et contra.

§ VI. Et tam filium alienum quis in locum nepotis adoptare potest, quam nepotem in locum filii.

§ 6. *A man may adopt the son of another as his grand-son, and the grand-son of another as his son.*

De adoptione in locum nepotis.

§ VII. Sed si quis nepotis loco adoptet, vel quasi ex filio, quem habet jam adoptatum, vel quasi ex illo, quem naturalem in suâ potestate habet, eo casu et filius consentire debet, ne ei invito suus hæres agnascatur. Sed, ex contrario, si avus ex filio nepotem det in adoptionem, non est necesse, filium consentire.

§ 7. *If a man, having already either a natural or an adopted son, is desirous to adopt another, as his grand-son, the consent of his son, whether natural or adopted, ought in this case to be first obtained, lest a* suus hæres, *or proper heir, should be intruded upon him. But, on the contrary, if a grandfather is willing to give his grand-son in adoption, the consent of the son is not necessary.*

Qui dari possunt in adoptionem.

§ VIII. In plurimis autem causis assimulatur is, qui adoptatus vel arrogatus est, ei, qui ex legitimo matrimonio natus est; et ideò, si quis per imperatorem, vel apud prætorem, vel præsidem provinciæ, non extraneum adoptaverit, potest eundem in adoptionem alii dari.

§ 8. *He who is either adopted or arrogated, bears similitude in many things to a son born in lawful matrimony; and therefore, if a person not a stranger is adopted either by rescript, or before a prætor, or the governor of a province, he may be given in adoption to another.*

Si is, qui generare non potest, adoptet.

§ IX. Sed et illud utriusque adoptionis commune est, quod et ii, qui generare non possunt, quales sunt spadones, adoptare possunt: castrati autem non possunt.

§ 9. *It is common to both kinds of adoption, that such as are impotent* [Spadones] *may, but those who are castrated, can not adopt.*

Si fœmina adoptet.

§ X. Fœminæ quoque arrogare non possunt, quia nec naturales liberos in suâ potestate habent: sed, ex indulgentiâ principis, ad solatium

§ 10. *Nor can women adopt; for the law does not place even their own children, under their power: but, when death hath deprived them*

liberorum amissorum adoptare possunt.

of their children, they may, by the indulgence of the prince, adopt others, as a comfort for their loss.

De liberis arrogatis.

§ XI. Illud proprium est adoptionis illius, quæ per sacrum oraculum fit, quod is, qui liberos in potestate habet, si se arrogandum dederit, non solum ipse potestati arrogatoris subjicitur, sed etiam liberi ejus fiunt in ejusdem potestate, tanquam nepotes. Sic etenim divus Augustus non ante Tiberium adoptavit, quam is Germanicum adoptasset; ut protinus arrogatione factâ inciperet Germanicus Augusti nepos esse.

§ 11. *It is peculiar to adoption by rescript, that, if a person, having children under his power, should give himself in arrogation, both he, as a son, and his children, as grandchildren, would become subject to the power of the arrogator. It was for this reason, that* Augustus *did not adopt* Tiberius, *'till* Tiberius *had adopted* Germanicus; *so that* Tiberius *became the son, and* Germanicus *the grandson of* Augustus, *at the same instant, by arrogation.*

De servo adoptato, vel filio nominato, à domino.

§ XII. Apud Catonem benè scriptum refert antiquitas, servos, si à domino adoptati sint, ex hoc ipso posse liberari. Unde et nos eruditi, in nostrâ constitutione, etiam cum servum, quem dominus, actis intervenientibus, filium suum nominaverit, liberum esse constituimus: licet hoc ad jus filii accipiendum non sufficiat.

§ 12. *The following answer of* Cato *was approved of by the ancient lawyers,* viz. *that slaves, adopted by their masters, obtain freedom by the adoption. Thus instructed, we have ordained, that a slave whom any master nominates to be his son, in the presence of a magistrate, becomes free by such nomination, although it does not convey to him any filial right.*

TITULUS DUODECIMUS.

QUIBUS MODIS JUS PATRIÆ POTESTATIS SOLVITUR.

D. 1. T. 7. Nov. 81.

Scopus et nexus. De morte.

VIDEAMUS nunc, quibus modis ii, qui alieno juri sunt subjecti, eo jure liberentur. Et quidem, quemadmodum liberentur servi à potestate dominorum, ex iis intelligere possumus, quæ de servis manumittendis superius exposuimus: hi vero, qui in potestate parentis sunt, mortuo eo, sui juris fiunt. Sed hoc distinctionem recipit: nam, mortuo patre, sanè omnimodo filii, filiæve, sui juris efficiuntur: mortuo verò avo, non omnimodo nepotes, neptesve, sui juris fiunt: sed ita, si post mortem avi in potestatem patris sui recasuri non sunt. Itaque, si, moriente avo, pater eorum vivit, et in potestate patris sui est, tunc post obitum avi in potestate patris sui fiunt. Si verò is quo tempore avus moritur, aut jam mortuus est, aut per emancipationem exiit de potestate patris, tunc ii, qui in potestatem ejus cadere non possunt, sui juris fiunt.

Let us now inquire how persons in subjection to others, can be freed. How slaves obtain their liberty, may be understood from what we have already said in treating of manumission: those who are under the power of a parent, become independent at his death; yet this rule admits of a distinction. When a father dies, his sons and daughters are, without doubt, independent; but, by the death of a grand-father, his grand-children do not become independent, unless there is an impossibility of their ever falling under the power of their father. Therefore, if their father is alive at the death of their grand-father, in whose power the father was, they then become subject to the power of their father. But, if their father is either dead or emancipated before the death of their grand-father, they then can not fall under the power of their father, but become independent.

De deportatione.

§ I. Cum autem is, qui ob aliquod maleficium in insulam deportatur, civitatem amittit, sequitur, ut, qui eo modo ex numero civium Romanorum tollitur, perindè quasi eo mortuo, desinant liberi in potestate

§ 1. *If a man, upon conviction of some crime, is deported into an island, he loses the rights of a* Roman *citizen; and it follows, that the children of a person thus banished cease to be under his power, as if he*

ejus esse. Pari ratione, et si is, qui in potestate parentis sit, in insulam deportatus fuerit, desinit esse in potestate parentis. Sed, si ex indulgentiâ principis restituti fuerint per omnia, pristinum statum recipiunt.

was naturally dead. And, by parity of reasoning, if a son is deported, he ceases to be under the power of his father. But, if by the indulgence of the prince a criminal is wholly restored, he regains his former condition.

De relegatione.

§ II. Relegati autem patres in insulam in potestate liberos retinent, et liberi relegati in potestate parentum remanent.

§ 2. *A Father, who is merely banished by relegation, retains his paternal power; and a son, who is relegated, still remains under the power of his father.*

De servitute pœnæ.

§ III. Pœnæ servus effectus filios in potestate habere desinit. Servi autem pœnæ efficiuntur, qui in metallum damnantur, et qui bestiis subjiciuntur.

§ 3. *When a man becomes the slave of punishment, he loses his paternal jurisdiction. Slaves of punishment are those, who are condemned to the mines, or sentenced to be destroyed by wild beasts.*

De dignitate.

§ IV. Filius-familias, si militaverit, vel si senator, vel consul factus fuerit, remanet in potestate patris: militia enim, vel consularis dignitas, de patris potestate filium non liberat. Sed, ex constitutione nostrâ, summa patriciatus dignitas illicò, imperialibus codicillis præstitis, filium a patriâ potestate liberat. Quis enim patiatur, patrem quidem posse, per emancipationis modum, potestatis suæ nexibus filium liberare; imperatoriam autem celsitudinem non valere eum, quem patrem sibi elegit, ab alienâ eximere potestate?

§ 4. *Although the son of a family becomes a soldier, a senator or a consul, he remains under the power of his father, from which neither the army, the senate, or consular dignity can emancipate him. But by our constitution the patrician dignity, conferred by our special diploma, shall free every son from paternal subjection. For it is absurd, that a parent may emancipate his son, and that the power of an emperor should not suffice to make any person independent, whom he hath chosen to be a father of the commonwealth.*

De captivitate et postliminio.

§ V. Si ab hostibus captus fuerit parens, quamvis servus hostium fiat, tamen pendet jus liberorum, propter jus postliminii: quia hi, qui ab hostibus capti sunt, si reversi fuerint, omnia pristina jura recipiunt: idcircò reversus etiam liberos habebit in potestate: quia postliminium fingit eum, qui captus est, in civitate semper fuisse. Si verò ibi decesserit, exindè, ex quo captus est pater, filius sui juris fuisse videtur. Ipse quoque filius, neposve, si ab hostibus captus fuerit, similiter dicimus, propter jus postliminii, jus quoque potestatis parentis in suspenso esse. Dictum autem est postliminium à *limine* et *post*. Unde eum, qui ab hostibus captus est, et in fines nostros postea pervenit, postliminio reversum rectè dicimus. Nam limina sicut in domo finem quendam faciunt, sic et imperii finem esse limen veteres voluerunt. Hinc et limen dictum est, quasi finis quidam et terminus. Ab eo postliminium dictum est, quia ad idem limen revertebatur, quod amiserat. Sed et, qui captus victis hostibus recuperatur, postliminio rediisse existimatur.

§ 5. *If a parent is taken prisoner, although he become a slave, he loses not his paternal power, which remains in suspense by reason of a privilege granted to all prisoners, namely, the right of return: for captives, when they obtain their liberty, are repossessed of all their former rights, in which paternal power is of course included; and, at their return, they are supposed, by a fiction of law, never to have been absent. If a prisoner dies captive, the son's independence is reckoned from the commencement of his father's captivity. Also, if a son, or grand-son, becomes a prisoner, the power of the parent is said, for the reason before assigned, to be only in suspense. The term* postliminium *is derived from* post *and* limen. *We therefore aptly use the expression* reversus postliminio, *when a person, who was a captive, returns within our own confines.*

De emancipatione, item de modis et effectibus ejusdem.

§ VI. Præterea, emancipatione quoque desinunt liberi in potestate parentum esse. Sed emancipatio antea quidem vel per antiquam legis observationem procedebat, quæ per imaginarias venditiones et intercedentes manumissiones celebraba-

§ 6. *Children also cease to be under the power of their parents by emancipation. Emancipation was effected according to our ancient law, either by imaginary sales and intervening manumissions, or by imperial rescript: but it has been our care*

tur, vel ex imperiali rescripto. Nostrâ autem providentiâ etiam hoc in meliùs per constitutionem reformavit; ut, fictione pristinâ explosâ, rectâ viâ ad competentes judices, vel magistratus, parentes intrent, et filios suos vel filias, vel nepotes vel neptes, ac deinceps, a suâ manu dimittant. Et tunc, ex edicto prætoris, in bonis ejusmodi filii vel filiæ, vel nepotis vel neptis qui quæve a parente manumissus vel manumissa fuerit, eadem jura præstantur parenti, quæ tribuuntur patrono in bonis liberti. Et præterea, si impubes sit filius, vel filia, vel cæteri, ipse parens ex manumissione tutelam ejus nanciscitur.

to reform these ceremonies by an express constitution, so that parents may now have immediate recourse to the proper judge or magistrate, and emancipate their children, grand-children, &c. of both sexes. And also, by a prætorian edict, the parent is allowed to have the same right in the goods of those, whom he emancipates, as a patron has in the goods of his freed-man. And farther, if the children emancipated are within the age of puberty, the parent, by whom they were emancipated, obtains the right of wardship or tutelage, by the emancipation.

Si alii emancipentur, alii retineantur in potestate.

§ VII. Admonendi autem sumus, liberum arbitrium esse ei, qui filium, et ex eo nepotem, vel neptem, in potestate habet, filium quidem de potestate dimittere, nepotem verò vel neptem retinere: et, è converso, filium quidem in potestate retinere, nepotem verò vel neptem manumittere: vel omnes sui juris efficere. Eadem et de pronepote et pronepte dicta esse intelliguntur.

§ 7. *A parent having a son under his power, and by that son a grand-son or grand-daughter, may emancipate his son, and retain his grand-son or grand-daughter in subjection. He may also emancipate his grand-son or grand-daughter, and retain his son; or, he may make them all independent. And the same may be said of a great-grand-son, or a great-grand-daughter.*

De adoptione.

§. VIII. Sed et, si pater filium, quem in potestate habet, avo, vel proavo naturali, secundum nostras constitutiones super his habitas, in adoptionem dederit, id est, si hoc ipsum actis intervenientibus apud competentem judicem manifestaverit, præsente eo, qui adoptatur, et

§ 8. *If a father gives his son in adoption to the natural grand-father or great-grand-father of such son, adhering to our constitutions for that purpose enacted, which enjoin the parent to declare intention before a competent judge, in the presence of the person to be adopted, and also in the*

non contradicente, nec non eo præsente, qui adoptat, solvitur quidem jus potestatis patris naturalis; transit autem in hujusmodi parentem adoptivum; in cujus personâ et adoptionem esse plenissimam antea diximus.

presence of the adoptor, then does the right of paternal power pass wholly from the natural father to the adoptive, in whose person, as we have before observed, adoption has its fullest extent.

De nepote nato post filium emancipatum.

§ IX. Illud scire oportet, quod si nurus tua ex filio tuo conceperit, et filium tuum emancipaveris, vel in adoptionem dederis, prægnante nuru tuâ, nihilominus, quod ex eâ nascitur, in potestate tuâ nascitur. Quod si post emancipationem vel adoptionem conceptus fuerit, patris sui emancipati, vel avi adoptivi, potestati subjicitur.

§ 9. *It is necessary to be known, that, if a son's wife hath conceived, and you afterwards emancipate that son or give him in adoption, his wife being pregnant, the child will be born under your paternal authority. But if the conception be subsequent to the emancipation or adoption, the child becomes subject at his birth, either to his emancipated father, or his adoptive grand-father.*

An parentes cogi possunt liberos suos de potestate dimittere?

§ X. Et quidem neque naturales liberi, neque adoptivi, ullo penè modo possunt cogere parentes de potestate suâ eos dimittere.

§ 10. *Children, either natural or adopted, can rarely compel their parents by any method to dismiss them from subjection.*

TITULUS DECIMUS-TERTIUS.

DE TUTELIS.

D. xxvi. T. 1. Nov. 72.

De personis sui juris.

TRANSEAMUS nunc ad aliam divisionem personarum. Nam ex his personis, quæ in potestate non sunt, quædam vel in tutelâ sunt, vel in curatione, quædam neutro jure

Let us now proceed to another division of persons. Of those, who are not under parental power, some are under tutelage, some under curation, and some under neither. Let

tenentur. Videamus ergo de his, quæ in tutelâ vel curatione sunt: ita enim intelligemus cæteras personas, quæ neutro jure tenentur. Ac prius dispiciamus de his, qui in tutelâ sunt.

us enquire then, what persons are under tutelage and curation; for thus we shall ascertain, who are not subject to either. And first of persons under tutelage.

Tutelæ definitio.

§ I. Est autem tutela (ut *Servius* definivit) vis ac potestas in capite libero, ad tuendum eum, qui per ætatem se defendere nequit, jure civili datâ ac permissâ.

§ 1. *Tutelage, as* Servius *has defined it, is an authority and power, given and permitted by the civil law, over such independent persons, as are unable, by reason of their youth, to protect themselves.*

Definitio et etymologia tutoris.

§ II. Tutores autem sunt, qui eam vim ac potestatem habent; exque ipsâ re nomen acceperunt. Itaque appellantur tutores, quasi tuitores atque defensores; sicut æditui dicuntur, qui ædes tuentur.

§ 2. *Tutors are those, who have this authority and power; and they take their name from the nature of their office. For they are called tutors,* quasi tuitores *defenders; as those, who have the care of the sacred buildings, are called* æditui, *quod* ædes tueantur.

Quibus testamento tutor datur: et primum, de liberis in potestate.

§ III. Permissum est itaque parentibus liberis impuberibus, quos in potestate habent, testamento tutores dare: et hoc in filios filiasque procedit omnimodò: nepotibus vero neptibusque ita demum parentes possunt testamento tutores dare, si post mortem eorum in potestatem patris sui non sunt recasuri. Itaque, si filius tuus, mortis tuæ tempore in potestate tuâ sit, nepotes ex eo non poterunt ex testamento tuo tutores habere, quamvis in potestate tuâ fuerint: scilicet, quia, mortuo te, in potestatem patris sui recasuri sunt.

§ 3. *Parents may assign tutors by testament to such of their children as are not arrived at puberty, and are under their power. And this privilege extends without exception over sons and daughters. But grand-fathers can only give tutors to their grand-children, when these cannot fall under the power of their father, after the death of their grand-father. Hence, if your son is in your power at the time of your death, your grand-children by that son can not receive tutors by your testament, although they were actually in your power; because at your decease they will become subject to their father.*

De posthumis.

§ IV. Cum autem in compluribus aliis causis posthumi pro jam natis habeantur, et in hac causâ placuit non minus posthumis, quam jam natis tutores dari posse; si modo in eâ causâ sint, ut, si vivis parentibus nascerentur, sui hæredes et in potestate eorum fierent.

§ 4. *As posthumous children are in many cases considered as already born before the death of their fathers; therefore tutors may be given (by testament) as well to a posthumous child, as to a child already born, if such posthumous child, had he been born in the life-time of his father, would have been his proper heir and under his power.*

De emancipatis.

§ V. Sed et, si emancipato filio tutor à patre datus fuerit testamento, confirmandus est ex sententiâ præsidis omnimodo, id est, sine inquisitione.

§ 5. *But, if a father gives a tutor by testament to his emancipated son, such tutor must be confirmed by the sentence of the governor of the province without inquisition.*

TITULUS DECIMUS-QUARTUS.

QUI TESTAMENTO TUTORES DARI POSSUNT.

D. xxvi. T. 2. C. v. T. 28.

Qui tutores dari possunt.

DARI autem tutor potest testamento non solùm pater-familias, sed etiam filius-familias.

Not only the father of a family may be appointed tutor by testament, but also the son of a family.

De servo.

§ I. Sed et servus proprius, testamento cum libertate rectè tutor dari potest: sed sciendum est, et sine libertate tutorem datum tacitè libertatem directam accepisse videri; et per hoc rectè tutorem esse: planè, si per errorem, quasi liber, tutor datus sit, aliud dicendum est.

§ 1. *A man may by testament assign his own slave to be a tutor with liberty. But note, that if a slave be appointed tutor by testament without mentioning liberty, he seems tacitly to be enfranchised, and is thus legally constituted a tutor; yet, if a testator through error, imagining his*

Servus autem alienus *pure* inutiliter testamento datur tutor: sed ita, *cum liber erit*, utiliter datur. Proprius autem servus inutiliter eo modo tutor datur.

slave to be free, by testament appoints him, as such, to be a tutor, the appointment will not avail. Also the absolute appointment of another man's slave to be a tutor is altogether ineffectual; but, if the appointment is upon condition, that the person appointed obtains his freedom, then it is well made: but, if a man by testament appoints his own slave to be a tutor, when he shall obtain his liberty, *the appointment will be void.*

De furioso et minore viginti-quinque annis.

§ II. Furiosus, vel minor viginti-quinque annis, tutor testamento datus, tutor tunc erit, cum compos mentis, aut major viginti-quinque annis, fuerit factus.

§ 2. *If a madman or a minor (under twenty-five) is by testament appointed tutor, the one shall begin to act, when he becomes of sound mind, and the other, when he has completed his twenty-fifth year.*

Quibus modis tutores dantur.

§ III. Ad certum tempus, vel ex certo tempore, vel sub conditione, vel ante hæredis institutionem, posse dari tutorem non dubitatur.

§ 3. *It is not doubted, but that a testamentary tutor may be appointed either* until *a certain time, or* from *a certain time, or conditionally, or before the institution of an heir.*

Cui dantur.

§ IV. Certæ autem rei, vel causæ, tutor dari non potest: quia personæ, non causæ, vel rei, tutor datur.

§ 4. *A tutor can not be assigned to any particular thing, or upon any certain account, but can only be given to persons.*

De tutore dato filiabus, vel filiis, vel liberis, vel nepotibus.

§ V. Si quis filiabus suis, vel filiis, tutores dederit, etiam posthumæ vel posthumo dedisse videtur: quia, filii vel filiæ appellatione, et posthumus et posthuma continentur. Quod si nepotes sint, an appellatione filiorum et ipsis tutores dati

§ 5. *If a man nominates a tutor for his sons or daughters, the nomination extends to his posthumous issue; because, under the appellation of son or daughter, a posthumous child is comprehended. But, are grand-children denoted by the word*

sint? Dicendum est, ut et ipsis quoque dati videantur, si modò liberos dixerit; cæterùm, si filios, non continebuntur. Alitèr enim filii, alitèr nepotes appellantur. Planè, si posteris dederit, tam filii posthumi, quam cæteri liberi, continebuntur.

sons? we answer, that under children, *grand-children are included, but not under* sons: *for son, and grand-son, differ in signification. But, if a testator assigns a tutor to his descendants, it is evident, that not only his posthumous sons are comprehended, but all his other children.*

TITULUS DECIMUS-QUINTUS.

DE LEGITIMA AGNATORUM TUTELA.

D. xxvi. T. 4. C. v. T. 30.

Summa.

QUIBUS autem testamento tutor datus non est, his, ex lege duodecim tabularum, agnati sunt tutores, qui vocantur legitimi.

The Agnati *by a law of the twelve tables, are appointed tutors to those, to whom no testamentary tutor was given; and these tutors are called* legitimi, *tutors by law,*

Qui sunt agnati.

§ I. Sunt autem agnati cognati, per virilis sexûs cognationem conjuncti, quasi à patre cognati: veluti frater ex eodem patre natus, fratris filius, neposve ex eo: item patruus et pratrui filius, neposve ex eo. At, qui per fœminini sexus personas cognatione junguntur, agnati non sunt, sed alias naturali jure cognati. Itaque amitæ tuæ filius non est tibi agnatus, sed cognatus: et invicem tu illi eodem jure conjungeris: quia, qui ex eâ nascuntur, patris, non matris, familiam sequuntur.

§ 1. Agnati *are those, who are collaterally related to us by males, as a brother by the same father, or the son of a brother, or by him a grand-son; also a father's brother, or the son of such brother, or by him a grand-son. But those, who are related to us by a female are not* agnate, *but* cognate, *bearing only a natural relation to us. Thus the son of a father's sister is related to you not by* agnation, *but* cognation; *and you are also related to him by* cognation; *for the children of a father's sister, follow the family of their father, and not that of their mother.*

§ II. Quod autem lex duodecim tabularum ab intestato vocat ad tutelam agnatos, non hanc habet significationem, si omninò non fecerit testamentum is, qui poterat tutores dare; sed si, quantum ad tutelam pertinet, intestatus decesserit: quod tunc quoque accidere intelligitur, cum is qui datus est tutor, vivo testatore decesserit.

§ 2. *The law of the twelve tables, in calling the* agnati *to tutelage in case of intestacy, relates not solely to persons altogether intestate, who might have appointed a tutor, but also to those, who are intestate only in respect of tutelage; and this may happen, if a tutor, nominated by testament, should die in the lifetime of the testator.*

Quibus modis agnatio, vel cognatio, finitur.

§ III. Sed agnationis quidem jus omnibus modis capitis diminutione perùmque perimitur: nam agnatio juris civilis nomen est; cognationis verò jus non omnibus modis commutatur: quia civilis ratio, civilia quidem jura corrumpere potest, naturalia verò, non utique.

§ 3. *The right of agnation is taken away by almost every diminution, or change of state; for agnation is but a name given by the civil law; but the right of cognation is not thus altered; for although civil policy may extinguish civil rights, yet over natural rights it has no such power.*

TITULUS DECIMUS-SEXTUS.

DE CAPITIS DIMINUTIONE.

D. iv. T. 5.

Definitio et divisio.

EST autem capitis diminutio prioris status mutatio; eaque tribus modis accidit: nam aut maxima est capitis diminutio, aut minor, (quam quidam mediam vocant,) aut minima.

Diminution is the change of a man's former condition; and this is threefold, the greater, the less, and the least.

De maximâ capitis diminutione.

§ I. Maxima capitis diminutio est, cum aliquis simul et civitatem et libertatem amittit; quod accidit

§ 1. *The greater diminution is, when a man loses both the right of a citizen and his liberty; as they do,*

his, qui servi pœnæ efficiuntur atrocitate sententiæ; vel libertis, ut ingratis erga patronos condemnatis; vel his, qui se ad pretium participandum venundari passi sunt.

who by the rigour of their sentence become the slaves of punishment; and freed-men, who are condemned to slavery for ingratitude to their patrons; and all such, who suffer themselves to be sold, to share the price.

De media.

§ II. Minor, sive media capitis diminutio est, cum civitas quidem amittitur, libertas verò retinetur; quod accidit ei, cui aquâ et igni interdictum fuerit, vel ei, qui in insulam deportatus est.

§ 2. *The less or mesne diminution is, when a man loses the rights of a citizen, but retains his liberty; which happens to him, who is forbidden the use of fire and water, or to him who is transported into an island.*

De minimâ.

§ III. Minima capitis diminutio est, cum civitas retinetur et libertas, sed status hominis commutatur: quod accidit his, qui, cum sui juris fuerint, cæperunt alieno juri subjecti esse; vel contra, veluti si filius-familias à patre emancipatus fuerit, est capite diminutus.

§ 3. *The least diminution is, when the condition of a man is changed without forfeiture either of civil rights or liberty; as when he, who is independent, becomes subject by adoption; or when the son of a family hath been emancipated by his father.*

De servo manumisso.

§ IV. Servus autem manumissus capite non minuitur; quia nullum caput habuit.

§ 4. *The manumission of a slave produces no change of state in him, because he had no state, or civil capacity.*

De mutatione dignitatis.

§ V. Quibus autem dignitas magis quam status permutatur, capite non minuuntur; et ideò, à senatu motos capite non minui, constat.

§ 5. *Those, whose dignity is rather changed than their state, do not suffer diminution; hence it is not diminution to be removed from the senatorial dignity.*

Interpretatio § ult. sup. tit. prox.

§ VI. Quod autem dictum est, manere cognationis jus etiam post capitis diminutionem, hoc ita est, si minima capitis diminutio interveniat: manet enim cognatio. Nam, si maxima capitis diminutio interveniat, jus quoque cognationis perit, ut puta servitute alicujus cognati; et ne quidem, si manumissus fuerit, recipit cognationem. Sed et si in insulam quis deportatus sit, cognatio solvitur.

§ 6. *We have said, that the right of cognation remains after diminution, but this relates only to the least diminution. For, by the greater diminution, as by servitude, the right of cognation is wholly destroyed, even so as not to be recovered by manumission. The right of cognation is also lost by the less or mesne diminution, as by departation into an island.*

Ad quos agnatos tutela pertinet.

§ VII. Cum autem ad agnatos tutela pertineat, non simul ad omnes pertinet, sed ad eos tantum, qui proximiore gradu sunt; vel si plures ejusdem gradus sunt, ad omnes pertinet; veluti si plures fratres sunt, qui unum gradum obtinent, paritèr ad tutelam vocantur.

§ 7. *Although the right of tutelage belongs to* agnati, *yet it belongs not to all, but to the nearest in degree only. But, if there be many in the same degree, the tutelage belongs to all of them, however numerous. For example, several brothers are all called equally to tutelage.*

TITULUS DECIMUS-SEPTIMUS.

DE LEGITIMA PATRONORUM TUTELA.

D. xxvi. T. 4. C. v. T. 30.

Ratio, ob quam patronorum tutela dicitur legitima.

EX eâdem lege duodecim tabularum, libertorum et libertarum tutela ad patronos liberosque eorum pertinet, quæ et ipsa legitima tutela vocatur; non quia nominatim in eâ lege de hac tutelâ caveatur; sed quia perinde accepta est per interpretationem, ac si verbis legis in-

By the same law of the twelve tables, the tutelage of freed-men and freed-women, belongs to their patrons, and to the children of such patrons; and this is tutelage by operation of law, although it exists not nominally in the law; but it is as firmly established by interpretation, as if it

troducta esset. Eo enim ipso, quod hæreditates libertorum libertarumque, si intestati decessissent, jusserat lex ad patronos liberosve eorum pertinere, crediderunt veteres, voluisse legem, etiam tutelas ad eos pertinere; cum et agnatos, quos ad hæreditatem lex vocat, eosdem et tutores esse jusserit; quia plerùmque, ubi successionis est emolumentum, ibi et tutelæ onus esse debet. Ideo autem diximus *plerumque*, quia, si fœminâ impubes manumittatur, ipsa ad hæreditatem vocatur, cum alius sit tutor.

had been introduced by express words. For, inasmuch as the law commands, that patrons and their children shall succeed to the inheritance of their freed-men or freed-women who die intestate, the ancient lawyers were of opinion that tutelage also by implication should belong to patrons and their children. And the law, which calls agnati *to the inheritance, commands them to be tutors, because the advantage of succession ought to be attended in most cases with the burden of tutelage. We have said,* in most cases, *because, if a person, not arrived at puberty, is manumitted by a female, she is called to the inheritance, but not to the tutelage.*

TITULUS DECIMUS-OCTAVUS.

DE LEGITIMA PARENTUM TUTELA.

EXEMPLO patronorum recepta est et alia tutela, quæ et ipsa legitima vocatur; nam, si quis filium aut filiam, nepotem aut neptem ex filio, et deinceps, impuberes emancipaverit, legitimus eorum tutor erit.

Another kind of tutelage termed legal, is received in imitation of parental: for, if a parent emancipate a son, a daughter, a grand-son, or a grand-daughter, who is the issue of that son, or any others descended from him by males in a right line and not arrived at puberty, then shall such parent be their legal tutor.

TITULUS DECIMUS-NONUS.

DE FIDUCIARIA TUTELA.

Filii-familias à patre manumissi pater tutor est legitimus; eo vero defuncto, frater tutor fiduciarius existit.

EST et alia tutela, quæ fiduciaria appellatur: nam, si parens filium vel filiam, nepotem vel neptem, vel deinceps, impuberes manumiserit, legitimam nanciscitur eorum tutelam: quo defuncto, si liberi ejus virilis sexus existant, fiduciarii tutores filiorum suorum, vel fratris, vel sororis, vel cæterorum, efficiuntur. Atqui, patrono legitimo tutore mortuo, liberi quoque ejus legitimi sunt tutores; quoniam filius quidem defuncti, si non esset à vivo patre emancipatus, post obitum ejus sui juris efficeretur, nec in fratrum potestatem recideret, ideòque nec in tutelam. Libertus autem, si servus mansisset, utique eodem jure apud liberos domini post mortem ejus futurus esset. Ita tamen hi ad tutelam vocantur, si perfectæ sint ætatis; quod nostra constitutio in omnibus tutelis et curationibus observari generalitèr præcepit.

There is another kind of tutelage called fiduciary; *for, if a parent emancipate a son or a daughter, a grand-son or a grand-daughter, or any other child, not arrived at puberty, he is then their legal tutor: but, at his death, his male children of age become the* fiduciary *tutors of their own sons, or of a brother, a sister, or of a brother's children emancipated by the deceased. But when a patron, who is a legal tutor, dies, his children also become legal tutors. The reason of which difference is this: a son, although never emancipated, becomes independent at the death of his father; and therefore as he falls not under power of his brothers, he can not be under their legal tutelage. But the condition of a slave is not altered at the death of his master; for he then becomes a slave to the children of the deceased. None can be called to tutelage, unless of full age; and our constitution hath commanded this rule to be generally observed in all tutelages and curations.*

TUTULUS VIGESIMUS.

DE ATILIANO TUTORE, ET EO, QUI EX LEGE JULIA ET TITIA DABATUR.

D. xxvi. T. 5. C. v. T. 34 et 36.

Jus antiquum, si nullus sit tutor.

SI cui nullus omninò tutor fuerat, ei dabatur, in urbe quidem à prætore urbano et majore parte tribunorum plebis, tutor ex lege Atilia: in provinciis verò à præsidibus provinciarum ex lege Julia et Titia.

Under the law Atilia, *the prætor of the city, with a majority of the tribunes, might assign tutors to all who were not otherwise intitled. In the provinces, tutors were appointed by the respective governors under the law* Julia *and* Titia.

Si spes sit futuri tutoris testamentarii.

§ I. Sed et, si in testamento tutor sub conditione, aut ex die certo datus fuerat, quamdiu conditio aut dies pendebat, iisdem legibus tutor alius interìm dari poterat. Item si purè datus fuerat, quamdiu ex testamento nemo hæres existebat, tamdiu ex iisdem legibus tutor petendus erat, qui desinebat esse tutor, si conditio extiterat, aut dies venerat, aut hæres extiterat.

§ 1. *If a testamentary tutor had been appointed conditionally, or from a certain day, another tutor might have been assigned by virtue of the above named laws, while the condition depended or until the day came. Also if a tutor had been given unconditionally, yet, as long as the testamentary heir deferred taking upon him the inheritance, another tutor might have been appointed during the interval. But his office ceased, when the condition happened, the day came, or the inheritance was entered upon.*

Si tutor ab hostibus sit captus.

§ II. Ab hostibus quoque tutore capto, ex his legibus tutor petebatur; qui desinebat esse tutor, si is, qui captus erat, in civitatem reversus fuerat: nam reversus recipiebat tutelam jure postliminii.

§ 2. *By the* Atilian *and* Julio-titian *laws, if a tutor was taken by the enemy, another tutor was applied for, whose office ceased, of course, when the first tutor returned from captivity; for he then resumed the tutelage by his right of return.*

Quando et cur desierint ex dictis legibus tutores dari.

§ III. Sed ex his legibus tutores pupillis desierunt dari, posteaquam primò consules pupillis utriusque sexus tutores ex inquisitione dare cœperunt, deinde prætores ex constitutionibus. Nam supradictis legibus neque de cautione à tutoribus exigendâ, rem pupillis salvam fore, neque de compellendis tutoribus ad tutelæ administrationem, quicquam cavebatur.

§ 3. *But these laws fell into disuse, first when the consuls began to assign tutors to pupils of either sex, on inquisition; and next, when the prætors were invested with the same authority by imperial constitutions. For, by the above mentioned laws, no security was required from the tutors for the forthcoming of the property, neither were they compelled to act.*

Jus novum.

§ IV. Sed hoc jure utimur, ut Romæ quidem præfectus urbi, vel prætor secundum suam jurisdictionem, in provinciis autem præsides ex inquisitione, tutores crearent; vel magistratus jussu præsidum, si non sint magnæ pupilli facultates.

§ 4. *But latterly, at* Rome, *the præfect of the city, or the prætor according to his jurisdiction, and, in the provinces, the respective governors may assign tutors upon inquiry; so may an inferior magistrate, at the command of a governor, if the possessions of the pupil are not large.*

Jus novissimum.

§ V. Nos autem, per constitutionem nostram hujusmodi difficultates hominum resecantes, nec expectatâ jussione præsidum, disposuimus, si facultates pupilli vel adulti usque ad quingentos solidos valeant, defensores civitatum unà cum ejusdem civitatis religiosissimo antistite, vel alias personas publicas, id est, magistratus, vel juridicum Alexandrinæ civitatis, tutores vel curatores creare; legitimâ cautelâ secundùm ejusdem constitutionis normam præstandâ, videlicet eorum periculo, qui eam accipiunt.

§ 5. *But for the ease of our subjects we have ordained, that the judge of* Alexandria *and the magistrates of every city, together with the chief ecclesiastic, may assign tutors or curators to pupils or adults, whose fortunes do not exceed five hundred* aurei, *without waiting for the command of the governor, to whose province they belong. But all such magistrates must, at their peril, take from every tutor, so appointed, the security required by our constitution.*

Ratio tutelæ.

§ VI. Impuberes autem in tutelâ esse, naturali juri conveniens est; ut is, qui perfectæ ætatis non sit, alterius tutelâ regatur.

§ 6. *It is agreeable to the law of nature, that persons under puberty, should be under tutelage; that all who are not of ripe age may be under the government of proper persons.*

De tutelæ ratione reddenda.

§ VII. Cum ergò pupillorum pupillarumque tutores negotia gerant, post pubertatem tutelæ judicio rationem reddunt.

§ 7. *Hence as tutors administer the affairs of their pupils, they may be compelled to account, by an action of tutelage, when their pupils arrive at puberty.*

TITULUS VIGESIMUS-PRIMUS.

DE AUCTORITATE TUTORUM.

D. xxvi. T. 8. C. v. T. 59.

In quibus causis auctoritas sit necessaria.

AUCTORITAS autem tutoris in quibusdam causis necessaria pupillis est, in quibusdam non est necessaria: ut, ecce, si quid dari sibi stipulentur, non est necessaria tutoris auctoritas; quod si aliis promittant pupilli, necessaria est tutoris auctoritas: namque placuit, meliorem quidem conditionem licere iis facere etiam sinè tutoris auctoritate; deteriorem verò non aliter, quam cum tutoris auctoritate. Unde in his causis, ex quibus obligationes mutuæ nascuntur, ut in emp-

The authority or confirmation of a tutor is in some cases necessary, and in others not. When a man stipulates to make a gift to a pupil, the authority of the tutor is not requisite; but, if a pupil enters into a contract, it is so; for the rule is, that pupils may better their condition, but not impair it, without the authority of their tutors. And therefore in all cases of mutual obligation, as in buying, selling, letting, hiring, mandates, deposites, &c. he, who contracts with a pupil, is bound

tionibus, venditionibus, locationibus, mandatis, depositis, si tutores auctoritas non interveniat, ipsi quidem, qui cum his contrahunt, obligantur; at invicem pupilli non obligantur.

by the contract; but not the pupil, unless the tutor hath authorised it.

Exceptio.

§ I. Neque tamen hæreditatem adire, neque bonorum possessionem petere, neque hæreditatem ex fideicommisso suscipere, aliter possunt, nisi tutoris auctoritate, (quamvis illis lucrosa sit,) ne ullum damnum habeant.

§ 1. *But no pupil, without the authority of his tutor, can enter upon an inheritance, or take upon him the possession of goods, or an inheritance in trust; for, there is a possibility of damage, as well as gain.*

Quomodo auctoritas interponi debet.

§ II. Tutor autem statim in ipso negotio præsens debet auctor fieri, si hoc pupillo prodesse existimaverit. Post tempus verò, vel per epistolam, aut per nuntium, interposita auctoritas nihil agit.

§ 2. *If a tutor would authorise any act, which he esteems advantageous to his pupil, he should be personally present; for his authority hath no effect, when given by letter, by messenger, or after contract.*

Quo casu interponi non potest.

§ III. Si inter tutorem pupillumque judicio agendum sit, quia ipse tutor in rem suam auctor esse non potest, non prætorius tutor (ut olim) constituir, sed curator in locum ejus dàtur; quo curatore interveniente, judicium peragitur; et, eo peracto, curator esse desinit.

§ 3. *When a suit is to be commenced between a tutor and his pupil, inasmuch as the tutor can not exercise his authority, as such, against himself, a curator, and not a prætorian tutor, (as was formerly the custom,) is appointed, by whose invention the suit is carried on; and, when it is determined, the curatorship ceases.*

TITULUS VIGESIMUS-SECUNDUS.

QUIBUS MODIS TUTELA FINITUR.

C. v. T. 60.

De pubertate.

PUPILLI, pupillæque, cum puberes esse cœperint, à tutelâ liberantur. Pubertatem autem veteres quidem non solùm ex annis, sed etiam ex habitu corporis, in masculis æstimari volebant. Nostra autem majestas, dignum esse castitate nostrorum temporum existimans, benè putavit, quod in fœminis etiam antiquis impudicum esse visum est, id est, inspectionem habitudinis corporis, hoc etiam in masculos extendere: et idco, nostrâ sanctâ constitutione promulgatâ, pubertatem in masculis post decimum quartum annum completum illicò initium accipere disposuimus: antiquitatis normam in fœminis benè positam in suo ordine relinquentes, ut post duodecim annos completos, viri potentes esse credantur.

Pupils, both male and female, are freed from tutelage, when they arrive at puberty. The ancients judged of puberty in males, not by years only, but also by the habit of their bodies. But our imperial majesty, regarding the purity of the present times, hath thought it proper, that the same decency, which was ever observed toward females, should be extended also to males: and therefore, by our sacred constitution, we have enacted, that puberty in males should be reputed to commence immediately after the completion of their fourteenth year. But, in relation to females, we leave that wholesome and ancient rule of law unaltered, by which they are esteemed marriageable after the twelfth year is completed.

De capitis diminutione pupilli.

§ I. Item finitur tutela, si arrogati sint adhuc impuberes, vel deportati: item si in servitutem pupillus redigatur, vel si ab hostibus captus fuerit.

§ 1. *Tutelage is determined before puberty, if the pupil is either arrogated, or suffers deportation, or is reduced to slavery, or becomes a captive.*

De conditionis eventu.

§ II. Sed et, si usque ad certam conditionem datus sit tutor testamento, æque evenit, ut desinat esse tutor existente conditione.

§ 2. *But, if a testamentary tutor is given upon a certain condition, when that condition is filled, the tutelage ceases.*

De morte.

§ III. Simili modo finitur tutela morte pupillorum vel tutorum.

§ 3. *Tutelage ends also by death of the tutor, or the pupil.*

De capitis diminutione.

§ IV. Sec et capitis diminutione tutoris, per quam libertas vel civitas amittitur, omnis tutela perit. Minimâ autem capitis diminutione tutoris, veluti si se arrogandum dederit, legitima tantum perit; cæteræ non pereunt. Sed pupilli et pupillæ capitis diminutio, licet minima sit, omnes tutelas tollit.

§ 4. *When a tutor under the greater diminution of state, loses his liberty and his citizenship, his tutelage is extinguished. But, if the least diminution only is suffered, as when a tutor gives himself in arrogation, then no species of tutelage is extinguished, but the legal. But every diminution of state in pupils, takes away all tutelage.*

De tempore.

§ V. Præterea, qui ad certum tempus testamento dantur tutores, finito eo, deponunt tutelam.

§ 5. *These, who are testamentary tutors for a term only, are discharged at the expiration of such term.*

De remotione et excusatione.

§ VI. Desinunt etiam tutores esse, qui vel removentur à tutelâ ob id, quod suspecti visi sunt; vel qui ex justâ causâ se excusant, et onus administrandæ tutelæ deponunt, secundum ea, quæ inferius proponemus.

§ 6. *They also cease to be tutors, who are removed on suspicion; or excuse and exempt themselves from the burden of tutelage for just reasons; of which hereafter.*

TITULUS VIGESIMUS-TERTIUS.

DE CURATORIBUS.

D. xxvii. T. 10. C. v. T. 70.

De adultis.

MASCULI quidem puberes, et fœminæ viri potentes, usque ad vigesimum quintum annum completum curatores accipiunt; quia licet puberes sint, adhuc tamen ejus ætatis sunt, ut sua negotia tueri non possint.

Males arrived at puberty, and females marriageable, do nevertheless receive curators, until they have completed their twenty-fifth year: for, they are not yet of an age to take proper care of their own affairs.

A quibus dentur curatores.

§ I. Dantur autem curatores ab eisdem magistratibus, à quibus et tutores. Sed curator testamento non datur; datus tamen confirmatur decreto prætoris vel præsidis.

§ 1. *Curators are appointed by the same magistrates, who appoint tutors. A curator can not be absolutely given by testament, but such nomination must be confirmed, by a prætor or governor of a province.*

Quibus dentur.

§ II. Item inviti adolescentes curatores non accipiunt, præterquam in litem; curator enim et ad certam causam dari potest.

§ 2. *No adults can be obliged to receive curators, unless* ad litem; *for a curator may be appointed to any special purpose.*

De furiosis et prodigis.

§ III. Furiosi quoque, et prodigi, licet majores viginti quinque annis sint, tamen in curatione sunt agnatorum, ex lege duodecim tabularum. Sed solent Romæ præfectus urbi vel prætores, et in provinciis præsides, ex inquisitione eis curatores dare.

§ 3. *By a law of the twelve tables, madmen and prodigals, although of full age, must be under curation of their* agnati. *But, if there are no* agnati, *or such only as are unqualified, then curators are appointed; at* Rome, *by the præfect of the city, or the prætor; in the* provinces, *by the governors, after requisite inquiry.*

De mente captis, surdis, &c.

§ IV. Sed et mente captis, et surdis, et mutis, et illis, qui perpetuo morbo laborant, (quia rebus suis superesse non possunt,) curatores dandi sunt.

§ 4. Persons deprived of their intellects, deaf, mute, or subject to any continual disorder, since they are unable to manage their own affairs, must be placed under curators.

De pupillis.

§ V. Interdum autem et pupilli curatores accipiunt; ut puta, si legitimus tutor non sit idoneus: quoniam habenti tutorem tutor dari non potest. Item, si testamento datus tutor, vel à prætore aut præside, idoneus non sit ad administrationem, nec tamen fraudulenter negotia administret, solet ei curator adjungi. Item loco tutorum, qui non in perpetuum, sed ad tempus à tutelâ excusantur, solent curatores dari.

§ 5. Sometimes even pupils receive curators; as when the legal tutor is unqualified: for a tutor must not be given to him, who already has a tutor. Also, if a tutor by testament, or appointed by a prætor, *or the governor of a province, appears afterwards incapable of executing his trust, it is usual, although he is guilty of no fraud, to appoint a curator to be joined with him. It is also usual to assign curators in the place of tutors excused for a time only.*

De constituendo actore.

§ VI. Quod si tutor vel adversâ valetudine, vel aliâ necessitate, impediatur, quo minus negotia pupilli administrare possit, et pupillus vel absit, vel infans sit, quem velit actorem, periculo ipsius tutoris, prætor, vel qui provinciæ præerit, decreto constituet.

§ 6. If a tutor, by illness or any other necessary impediment, should be disabled from the execution of his office, and his pupil should be absent, or an infant, then the prætor, or governor of the province shall decree any person, whom the tutor approves of, to be the pupil's agent, on the responsibility of the tutor.

TITULUS VIGESIMUS-QUARTUS.

DE SATISDATIONE TUTORUM, VEL CURATORUM.

D. xxvii. T. 7. C. v. T. 57.

Qui satisdare cogantur.

NE tamen pupillorum, pupillarumve, et eorum, qui quæve in curatione sunt, negotia à curatoribus tutoribusve consumantur vel diminuantur, curet prætor, ut et tutores et curatores eo nomine satisdent. Sed hoc non est perpetuum ; nam tutores testamento dati, satisdare non coguntur : quia fides eorum et diligentia ab ipso testatore approbata est. Item ex inquisitione tutores vel curatores dati, satisdatione non onerantur, quia idonei electi sunt.

It is a branch of the prætor's office to see, that tutors and curators give a sufficient security for the safety and indemnification of their pupils. But this is not always necessary ; for a testamentary tutor is not compelled to give security, inasmuch as his fidelity and diligence seem sufficiently approved of by the testator. Also tutors, and curators appointed upon inquiry, are supposed to be qualified, and therefore not obliged to give security.

Quatenus satisdatio in iis, qui satisdare non compelluntur, locum habere possit.

§ I. Sed, si ex testamento vel inquisitione duo pluresve dati fuerint, potest unus offerre satisdationem de indemnitate pupilli vel adolescentis, et contutori suo vel concuratori præferri, ut solus administret ; vel ut contutor aut concurator satis offerens præponatur ei, ut et ipse solus administret. Itaque per se non potest petere satisdationem à contutore vel concuratore ; sed offerre debet, ut electionem det concuratori vel contutori suo, utrum velit satis accipere, an satisdare. Quod si nemo eorum satis offerat, siquidem adscriptum fuerit à testatore, quis gerat, ille gerere debet ; quod si non fuerit adscriptum,

§ 1. *If two, or more, are appointed by testament, or by a magistrate, after inquiry, to be tutors or curators, any one of them, by offering security, may be preferred to the sole administration, or cause his co-tutor, or co-curator, to give security, in order to be admitted himself to the administration. Thus a man can not demand security from his co-tutor or co-curator ; but by offering it himself, he may compel his co-tutor, or co-curator, to give or receive security. When no security is offered, the person appointed by the testator must be preferred ; but, if no such person be appointed, then he must administer whom a majority of the tutors shall*

quem major pars elegerit, ipse gerere debet, ut edicto prætoris cavetur. Sin autem ipsi tutores dissenserint circa eligendum eum vel eos, qui gerere debent, prætor partes suas interponere debet. Idem et in pluribus ex inquisitione datis comprobandum est; id est, ut major pars eligere possit, per quem administratio fiat.

elect, according to the prætorian edict: if they disagree in their choice, the prætor may interpose. The same rule is to be observed, when many, either tutors or curators, are nominated on inquisition by the magistrate, viz. that a majority determine who shall administer.

Qui ex administratione tutelæ vel curationis tenentur.

§ II. Sciendum autem est, non solùm tutores vel curatores pupillis vel adultis, cæterisque personis, ex administratione rerum teneri: sed etiam in eos, qui satisdationem accipiunt, subsidiariam actionem esse, quæ ultimum eis præsidium possit afferre. Subsidiaria autem actio in eos datur, qui aut omninò à tutoribus vel curatoribus satisdari non curaverunt, aut non idonèe passi sunt caveri: quæ quidem tam ex prudentum responsis, quam ex constitutionibus imperialibus, etiam in hæredes eorum extenditur.

§ 2. *It is to be noted that tutors and curators are not alone subject to an action, on account of administering the affairs of pupils, minors, and others under their protection. For a subsidiary action, which is the last remedy to be used, will also lie against a magistrate either for entirely omitting to take, or for taking insufficient sureties: and this action according to the answers of the lawyers, as well as by the imperial constitutions, is extended even against the heir of such magistrate.*

Si tutor vel curator cavere nolit.

§ III. Quibus constitutionibus et illud exprimitur, ut, nisi caveant tutores et curatores, pignoribus captis coerceantur.

§ 3. *By the same constitutions it is expressly enacted, that tutors and curators, who refuse to give caution, may be compelled to it.*

Qui dictâ actione non tenentur.

§ IV. Neque autem præfectus urbi, neque prætor, neque præses provinciæ, neque quisquam alius, cui tutores dandi jus est, hac actione tenebitur: sed hi tantummodo, qui satisdationem exigere solent.

§ 4. *Neither the præfect of the city, nor the prætor, nor the governor of a province, nor any other, who has power to assign tutors, shall be subject to a subsidiary action: but those magistrates only are liable to it, who exact the security.*

De tribus tutelæ et curæ oneribus.

§ V. Item tria onera tutelæ non affectatæ, vel curæ, præstant vacationem, quamdiù administrantur: ut tamen, plurium pupillorum tutela vel cura eorundem bonorum, veluti fratrum, pro unâ computetur.

§ 5. *Three tutelages or curatorships unsolicited, excuse during their continuance, from the burden of a fourth. But the tutelage or curation of many pupils, as of several brothers, under one patrimony, is reckoned as one only.*

De paupertate.

§ VI. Sed et propter paupertatem excusationem tribui, tam divi fratres, quam per se divus Marcus rescripsit, si quis imparem se oneri injuncto possit docere.

§ 6. *The divine brothers have declared by their rescript, and the emperor* Marcus *also, that poverty is a sufficient excuse, when it can be proved such, as to render a man incapable of the burden imposed upon him.*

De adversâ valetudine.

§ VII. Item propter adversam valetudinem, propter quam ne suis quidem negotiis interesse potest, excusatio locum habet.

§ 7. *Illness also, if it prevent a man from transacting his own business, is a sufficient excuse.*

De imperitiâ literarum.

§ VIII. Similiter eos, qui literas nesciunt, esse excusandos, Divus Pius rescripsit; quamvis et imperiti literarum possint ad administrationem negotiorem sufficere.

§ 8. *By the rescript of the emperor* Antoninus Pius, *illiterate persons are to be excused; although in some cases they may suffice.*

De inimicitiâ patris.

§ IX. Item si propter inimicitias aliquem testamento tutorem pater dederit, hoc ipsum præstat ei excusationem; sicut per contrarium non excusantur, qui, se tutelam administraturos, patri pupillorum promiserant.

§ 9. *If a father through enmity appoints any particular person, by testament, the motive will afford a sufficient excuse. Contrarywise, he who by promise hath engaged himself to a testator, can not be excused from the office of tutelage.*

De ignorantiâ tutoris.

§ X. Non esse autem admittendam excusationem ejus, qui hoc solo utitur, quòd ignotus patri pupillorum sit, Divi fratres rescripserunt.

§ 10. *The divine brothers have enacted by their rescript, that the pretence of being unknown to the father of a pupil is not of itself a sufficient excuse.*

De inimicitiis cum patre pupilli vel adulti.

§ XI. Inimicitiæ, quas quis cum patre pupillorum vel adultorum exercuit, si capitales fuerunt, nec reconciliatio intervenit, à tutelâ vel curâ solent excusare.

§ 11. *A capital enmity, against the father of a pupil or adult, unreconciled, is usually considered as an excuse from tutelage or curatorship.*

De status controversiâ à patre pupilli illatâ.

§ XII. Item is, qui status controversiam à pupillorum patre passus est, excusatur à tutelâ.

§ 12. *Also he, whose condition hath been controverted by the father of the pupil, is excused from the tutelage.*

De ætate.

§ XIII. Item major septuaginta annis à tutelâ et curâ se potest excusare. Minores autem viginti quinque annis olim quidem excusabantur: nostrâ autem constitutione prohibentur ad tutelam vel curam adspirare: adeò ut nec excusatione opus sit. Quâ constitutione cavetur, ut nec pupillus ad legitimam tutelam vocetur, nec adultus: cum sit incivile, eos, qui alieno auxilio in rebus suis administrandis egere noscuntur, et ab aliis reguntur, aliorum tutelam vel curam subire.

§ 13. *Persons above seventy years of age, may be excused from tutelage and curation. Also minors were formerly excusable; but, by our constitution, they are now prohibited from aspiring to these trusts; so that excuses are become unnecessary. By the same constitution, neither pupils, nor adults, shall be called even to a legal tutelage. For it is absurd that persons, who are themselves governed, and need assistance in the administration of their own affairs, should be admitted, either as tutors or curators, to manage the affairs of others.*

De militiâ.

§ XIV. Idem et in milite observandum est, ut nec volens ad tutelæ onus admittatur.

§ 14. *Note also, that no military person, although willing, can be admitted tutor or curator.*

De grammaticis, rhetoribus, et medicis.

§ XV. Item Romæ grammatici, rhetores, et medici, et qui in patriâ sua has artes exercent, et intra numerum sunt, à tutelâ et curâ habent vacationem.

§ 15. *At* Rome, *grammarians, rhetoricians, and physicians, and they who exercise such professions in their own country, within the number authorised, are exempted from tutelage and curation.*

De tempore et modo proponendi excusationes.

§ XVI. Qui autem se vult excusare, si plures habeat excusationes, et de quibusdam non probaverit, aliis uti, intra tempora constituta, non prohibetur. Qui autem excusare se volunt, non appellant, sed intra quinquaginta dies continuos, ex quo cognoverint se tutores vel curatores datos, se excusare debent, cujuscunque generis sint; id est, qualitercunque dati fuerint tutores, si intra centesimum lapidem sint ab eo loco, ubi tutores dati sunt. Si vero ultra centesimum lapidem habitant, dinumeratione factâ viginti millium diurnorum, et amplius triginta dierum; qui tamen, ut Scævola dicebat, sic debent computari, ne minus sint, quam quinquaginta dies.

§ 16. *He who can allege many excuses, and hath failed in his proof of some, is not prohibited from assigning others within the time prescribed. But tutors and curators of whatever kind, whether legal, testamentary, or dative, (if desirous to excuse themselves) ought not to prefer an appeal from their appointment; but they should exhibit their excuses before the proper magistrate, within fifty days after they are certified of their nomination, if they are within an hundred miles from the place of nomination. But, if they are distant more than an hundred miles, they are allowed a day for every twenty miles, and thirty days besides; which, taken together, ought never, according to* Scævola, *to make a less number of days than fifty.*

De excusatione pro parte patrimonii.

§ XVII. Datus autem tutor ad universum patrimonium datus esse creditur.

§ 17. *When a tutor is appointed, he is considered as having the care of the whole patrimony of his pupil.*

De tutelæ gestione.

§ XVIII. Qui tutelam alicujus gessit, invitus curator ejusdem fieri non compellitur; in tantum ut, licet pater-familias, qui testamento tutorem dedit, adjecerit se eundem

§ 18. *A tutor of a minor, can not be compelled to become his curator: and, by the rescript of the emperors* Severus *and* Antoninus, *although the father of a family should, by testa-*

curatorem dare, tamen, invitum eum curam suscipere non cogendum, divi Severus et Antoninus rescripserunt.

ment, appoint any person to be first the tutor of his children, and afterwards their curator, the person so appointed if unwilling, is not compellable to serve.

De marito.

§ XIX. Iidem rescripserunt, maritum uxori suæ curatorem datum excusare se posse, licet se immisceat.

§ 19. *The same emperors have enacted, that a husband may excuse himself from being curator to his wife, even after he hath begun to act.*

De falsis allegationibus.

§ XX. Si quis autem falsis allegationibus excusationem tutelæ meruerit, non est liberatus onere tutelæ.

§ 20. *If any man by false allegations, hath merited to be removed from tutelage, he is not therefore freed from the burden of this office.*

TITULUS VIGESIMUS-SEXTUS.

DE SUSPECTIS TUTORIBUS VEL CURATORIBUS.

D. xxvi. T. 10. C. v. T. 43.

Unde suspecti crimen descendat.

SCIENDUM est, suspecti crimen ex lege duodecim tabularum descendere.

The accusation of a suspected tutor, or curator, is derived from the law of the twelve tables.

Qui de hoc crimine cognoscunt.

§ I. Datum autem est jus removendi tutores suspectos Romæ prætori, et in provinciis præsidibus earum, et legato proconsulis.

§ 1. *At* Rome *the power of removing suspected tutors belongs to the prætor; in the* provinces *to the governors, or to the legate of a proconsul.*

Qui suspecti fieri possunt.

§ II. Ostendimus, qui possunt de suspecto cognoscere; nunc videamus, qui suspecti fieri possint: et possunt quidem omnes tutores fieri suspecti, sive sint testamentarii, sive non sint, sed alterius generis tutores. Quare etsi legitimus fuerit tutor, accusari poterit. Quid si patronus? Adhuc idem erit dicendum: dummodo meminerimus, famæ patroni parcendum esse, licet ut suspectus remotus fuerit.

§ 2. *We have shewn what magistrates may take cognisance of suspected persons: let us now inquire, what persons may become suspected. And all tutors may become so, whether testamentary, or other. For even a legal tutor may be accused; so may a* patron: *but we must remember, that, as such, his reputation must be spared, although he be removed from his trust, as a suspected person.*

Qui possunt suspectos postulare.

§ III. Consequens est, ut videamus, qui possint suspectos postulare. Et sciendum est, quasi publicam esse hanc accusationem; hoc est, omnibus patere. Quinimo mulieres admittuntur ex rescripto divorum Severi et Antonini; sed hæ solæ, quæ, pietatis necessitudine ductæ, ad hoc procedunt: ut puta mater, nutrix quoque et avia: potest et soror. Sed et, si qua alia mulier fuerit, quam prætor propensâ pietate intellexerit, sexûs verecundiam non egredientem, sed pietate productam, non sustinere injuriam pupillorum, admittet eam ad accusationem.

§ 3. *Let us then inquire, by whom suspected persons may be accused. Now an accusation of this sort is of a public nature, and open to all. For, by a rescript of the emperors* Severus *and* Antoninus, *even women are admitted to be accusers; yet such only, as are induced by their duty, or by their relation to the minor; thus a mother, a nurse, or a grand-mother, or a sister, may become accusers. But the prætor can at discretion admit any woman, who acting with becoming modesty, but impatient of wrongs offered to pupils, appears to have no other motive, than to relieve the injured.*

An pubes vel impubes.

§ IV. Impuberes non possunt tutores suos suspectos postulare: puberes autem curatores suos ex consilio necessariorum suspectos possunt arguere: et ita Divi Severus et Antoninus rescripserunt.

§ 4. *No pupil can bring an accusation of suspicion against his tutor; but adults, by the rescript of* Severus *and* Antoninus, *are permitted, when they act by advice of persons related to them, to accuse their curators.* (Prochein ami.)



DIVI JUSTINIANI

INSTITUTIONUM

LIBER SECUNDUS.

TITULUS PRIMUS.

DE RERUM DIVISIONE, ET ACQUIRENDO EARUM DOMINIO.

D. 1. T. 8. C. xli. T. 1.

Continuatio et duplex rerum divisio.

SUPERIORE libro de jure personarum exposuimus; modò videamus de rebus; quæ vel in nostro patrimonio, vel extrà patrimonium nostrum, habentur. Quædam enim naturali jure communia sunt omnium, quædam publica, quædam universitatis, quædam nullius, pleraque singulorum, quæ ex variis causis cuique acquiruntur, sicut ex subjectis apparebit.

We have treated of persons in the foregoing book; let us now inquire concerning things, which may be divided into such as are, and such as are not within our patrimony, for some things are in common by the law of nature; some are public; some universal; and some there are, to which no man can have a right. But most things are the property of individuals, by whom they are variously acquired, as will appear hereafter.

De aere, aquâ profluente, mari, littore, &c.

§ I. Et quidem naturali jure communia sunt omnium hæc, aer, aqua profluens, mare, et per hoc littora maris: nemo igitur ad littus maris accedere prohibetur; dum tamen à villis et monumentis et ædificiis abstineat: quia non sunt juris gentium, sicut est mare.

§ 1. *Things common to mankind by the law of nature, are the air, running water, the sea, and consequently the shores of the sea; no man therefore is prohibited from approaching any part of the seashore, whilst he abstains from damaging farms, monuments, edifices, &c. which are not in common as the sea is.*

De fluminibus et portubus.

§ II. Flumina autem omnia, et portus, publica sunt: ideòque jus piscandi omnibus commune est in portu fluminibusque.

§ 2. *Rivers and ports are public; hence the right of fishing in a port, or in rivers are in common.*

Definitio littoris.

§ III. Est autem littus maris, quatenus hybernus fluctus maximus excurrit.

§ 3. *All that tract of land, over which the greatest winter flood extends itself, is the sea-shore.*

De usu et proprietate riparum.

§ IV. Riparum quoque usus publicus est jure gentium, sicut ipsius fluminis; itaque naves ad eas appellere, funes arboribus ibi natis religare, onus aliquod in his reponere, cuilibet liberum est, sicut per ipsum flumen navigare: sed proprietas earum illorum est, quorum prædiis hærent: quâ de causâ arbores quoque in eisdem natæ eorundem sunt.

§ 4. *By the law of nations the use of the banks is as public as the rivers; therefore all persons are at equal liberty to land their vessels, unload them, and to fasten ropes to trees upon the banks, as to navigate upon the river itself; still, the banks of a river are the property of those who possess the land adjoining; and therefore the trees which grow upon them, are also the property of the same persons.*

De usu et proprietate littorum.

§ V. Littorum quoque usus publicus est, et juris gentium, sicut et ipsius maris: et ob id cuilibet liberum est casam ibi ponere, in quam se recipiat, sicut retia siccare, et ex mari deducere; proprietas autem eorum potest intelligi nullius esse: sed ejusdem juris esse, cujus et mare, et, quæ subjacent mari, terra vel arena.

§ 5. *The use of the sea-shore, as well as of the sea, is also public by the law of nations; and therefore any person may erect a cottage upon it, to which he may resort to dry his nets, and haul them from the water; for the shores are not understood to be property in any man, but are compared to the sea itself, and to the sand or ground which is under the sea.*

De rebus universitatis.

§ VI. Universitatis sunt, non singulorum, quæ in civitatibus sunt,

§ 6. *Theatres, ground appropriated for a race, or public exercise,*

theatra, stadia, et his similia, et si qua alia sunt communia civitatum.

and things of this nature, which belong to a whole city, are public, and not private property.

De rebus nullius.

§ VII. Nullius autem sunt res sacræ, et religiosæ, et sanctæ: quod enim divini juris est, id nullius in bonis est.

§ 7. *Things sacred, religious and holy, belong to no individual: for that which is of divine right, is not private property.*

De rebus sacris.

§ VIII. Sacræ res sunt, quæ ritè per pontifices Deo consecratæ sunt; veluti ædes sacræ, et donaria, quæ ritè ad ministerium Dei dedicata sunt; quæ etiam per nostram constitutionem alienari et obligari prohibuimus, exceptâ causâ redemptionis captivorum. Si quis autem auctoritate suâ quasi sacrum sibi constituerit, sacrum non est, sed profanum. Locus autem, in quo ædes sacræ sunt ædificatæ, etiam, diruto ædificio, sacer adhuc manet, ut et Papinianus scripsit.

§ 8. *Things, which have been duly consecrated by the pontiffs, are sacred; as churches, chapels, and moveables, properly dedicated to the service of God: which we have forbidden by our constitution to be aliened or obligated, unless for the redemption of captives. But, if a man should consecrate a building by his own authority, it would not thus be rendered sacred; but the ground upon which a sacred edifice hath once been erected, will, according to* Papinian, *continue to be sacred, although the edifice is destroyed.*

De religiosis.

§ IX. Religiosum locum unusquisque suâ voluntate facit, dum mortuum infert in locum suum: in communem autem locum purum, invito socio, inferre non licet: in commune verò sepulchrum etiam, invitis cæteris, licet inferre. Item, si alienus ususfructus est, proprietarium placet, nisi consentiente usufructuario, locum religiosum non facere. In alienum locum, consentiente domino, licèt inferre; et, licèt postea ratum non habuerit, quam

§ 9. *Any man may at his will render his own place religious, by making it the repository of a dead body; yet, when two are joint possessors of ground, not before used for such a purpose, the one cannot make it religious without consent of the other. But, when there is a sepulchre in common, any joint possessor may use it, although the rest dissent. And, when there is a proprietor, and an usufructuary, of the same place, the proprietor, without the consent of*

illatus est mortuus, tamen locus religiosus fit.

the usufructuary, cannot render it religious. But a dead body may be laid in a place, with consent of the owner; who if he should afterwards dissent, yet the place becomes religious.

De rebus sanctis.

§ X. Sanctæ quoque res, veluti muri et portæ civitatis, quodammodò divini juris sunt; et ideò nullius in bonis sunt. Ideò autem muros sanctos dicimus, quia pœna capitis constituta est in eos, qui aliquid in muros deliquerint. Ideò et legum eas partes, quibus pœnas constituimus adversus eos, qui contra leges fecerint, sanctiones vocamus.

§ 10. *Holy things also, as the walls and gates of a city, are in some sort of divine right, and therefore the property of no man. The walls of a city are esteemed holy, inasmuch as any offence against them is punished capitally: and therefore, all those parts of the laws, by which punishments are inflicted upon transgressors, we term* sanctions.

De rebus singulorum.

§ XI. Singulorum autem hominum multis modis res fiunt: quarundum enim, rerum dominium nancisimur jure naturali, quod, sicut diximus, appellatur jus gentium; quarundum verò jure civili. Commodiùs est itaque à vetustiore jure incipere. Palàm est autem, vetustius esse jus naturale, quod cum ipso genere humano rerum natura prodidit. Civilia autem jura tunc esse cœperunt, cum et civitates condi, et magistratus creari et leges scribi, cœperunt.

§ 11. *There are various means, by which things become private property. Of some we obtain dominion by the law of nature, which (as we have already observed) is also called the law of nations; of others by the civil law. But it will be most convenient to begin from the more ancient law; that law, which nature established at the birth of mankind; for civil laws could then only begin to exist, when cities began to be built, magistracies to be created, and laws to be written.*

De occupatione ferarum.

§ XII. Feræ igitur bestiæ, et volucres, et pisces, et omnia animalia, quæ mari, cœlo, et terrâ nascuntur, simul atque ab aliquo capta fuerint, jure gentium statim illius esse in-

§ 12. *Wild beasts, birds, fish, and all animals, bred either in the sea, the air, or upon the earth, so soon as they are taken, become by the law of nations, the property of the cap-*

cipiunt: quod enim ante nullius est, id naturali ratione occupanti conceditur: nec interest, feras bestias et volucres utrùm in suo fundo quis capiat, an in alieno. Planè, qui alienum fundum ingreditur venandi ut aucupandi gratiâ, potest à domino, si is præviderit, prohiberi, ne ingrediatur. Quicquid autem eorum ceperis, eousque tuum esse intelligitur, donec tuâ custodiâ coercetur; cum verò tuam evaserit custodiam, et in libertatem naturalem sese [illegible]ceperit, tuum esse desinit, et rursus occupantis fit. Naturalem autem libertatem recipere intelligitur, cum vel oculos tuos effugerit, vel ita sit in conspectu tuo, ut difficilis sit ejus persecutio.

tor: for natural reason gives to the first occupant, that which had no previous owner: and it is not material, whether a man take wild beasts or birds upon his own, or upon the ground of another: although whoever hath entered into the ground of another for the sake of hunting or fowling, might have been prohibited by the proprietor, if he had foreseen the intent. Whatever of this kind you take, is regarded as your property while it remains under your coercion; but when it hath escaped your custody, and recovered its natural liberty, it ceases to be yours and becomes the property of the first who seizes it. It is understood to have recovered its natural liberty, if it hath escaped your sight; or although not out of sight, yet if it cannot be pursued and retaken without great difficulty.

De vulneratione.

§ XIII. Illud quæsitum est, an si fera bestia ita vulnerata sit, ut capi possit, statim tua esse intelligatur. Et quibusdam placuit, statim esse tuam, et eousque tuam videri, donec eam persequaris: quod si desieris persequi, desinere tuam esse, et rursus fieri occupantis: alii verò putaverunt, non aliter tuam esse, quam si eam ceperis. Sed posteriorem sententiam nos confirmamus, quod multa accidere soleant, ut eam non capias.

§ 13. *It hath been questioned, whether a wild beast belongs to him, by whom it hath been so wounded, that it may be taken. And, in the opinion of some, it doth so, as long as he pursues it; but, if he quits the pursuit, it ceases to be his, and again becomes the right of the first occupant. Others have thought, that property in a wild beast must attach to the actual taking it. We confirm this latter opinion; because many accidents happen, which prevent the capture.*

De apibus.

§ XIV. Apium quoque fera natura est: itaque apes, quæ in arbore tuâ consederint, antequam à te alveo includantur, non magis tuæ intelliguntur esse, quam volucres, quæ in arbore tuâ nidum fecerint: ideòque, si alius eas incluserit, is earum dominus erit. Favos quoque, si quos effecerint, eximere quilibet potest. Planè integrâ re, si prævideris ingredientem fundum tuum, poteris eum jure prohibere, ne ingrediatur. Examen quoque, quod ex alveo tuo evolaverit, eousque intelligitur esse tuum, donec in conspectu tuo est, nec difficilis persecutio ejus est; alioquin, occupantis fit.

§ 14. *Bees also are wild by nature: therefore, although they swarm upon your tree, they are not reputed, until they are hived by you, to be more your property, than the birds, which have nests there: so, if any other person inclose them in a hive, he becomes their proprietor. Their honeycombs also, if any, become the property of him who takes them: but clearly, if you observe any person entering into your ground, the object untouched, you may justly hinder him. A swarm, which hath flown from your hive, is still reputed to continue yours, as long as it is in sight, and may easily be pursued; but, in any other case, it will become the property of the occupant.*

De pavonibus et columbis, et cæteris animalibus mansuefactis.

§ XV. Pavonum quoque et columbarum fera natura est; nec ad rem pertinet, quod ex consuetudine evolare et revolare solent; nam et apes idem faciunt, quarum constat feram esse naturam. Cervos quoque quidem ita mansuetos habent, ut in silvam ire et redire soleant, quorum et ipsorum feram esse naturam nemo negat. In iis autem animalibus, quæ ex consuetudine abire et redire solent, talis regula comprobata est; ut eousque tua esse intelligantur, donec animum revertendi habeant: nam, si revertendi animum habere desierint, etiam tua esse desinunt, et fiunt occupan-

§ 15. *Peacocks and Pidgeons are also naturally wild; nor is it any objection that after every flight, it is their custom to return: for bees that are naturally wild, do so too. Some have had deer so tame, that they would go to the woods, and return at regular periods; yet no one denies, but that deer are wild by nature. But, with respect to animals, which go and return customarily, the rule is, that they are considered yours, as long as they retain an inclination to return; but, if this ceases, they cease to be yours; and will again become the property of those who take them. These animals seem to have lost the*

tium. Revertendi autem animum videntur desinere habere tunc, cum revertendi consuetudinem deseruerint.

inclination to return, when they disuse the custom of returning.

De gallinis et anseribus.

§ XVI. Gallinarum autem et anserum non est fera natura: idque ex eo, possumus intelligere, quod aliæ sunt gallinæ, quas feras vocamus; item alii sunt anseres, quos feros appellamus: ideòque, si anseres tui, aut gallinæ tuæ, aliquo modo turbati turbatæve evolaverint, licet conspectum tuum effugerint, quocùmque tamen loco sint, tui tuæve esse intelliguntur; et, qui lucrandi animo ea animalia detinet, furtum committere intelligitur.

§ 16. *But geese, and fowls are not wild by nature; and this we may observe, because there is a kind of fowls and geese, which in contradistinction we term wild; and therefore if your geese or fowls, being disturbed and frightened, should take flight, they are still regarded as yours wherever found, although you may have lost sight of them; and whoever detains such animals, with a lucrative view, is understood to commit a theft.*

De occupatione in bello.

§ XVII. Item ea, quæ ex hostibus capimus, jure gentium statim nostra fiunt; adèo quidem, ut et liberi homines in servitutem nostram deducantur; qui tamen, si evaserint nostram potestatem, et ad suos reversi fuerint, pristinum statum recipiunt.

§ 17. *What we take from our enemies in war, becomes instantly our own by the law of nations; so that free-men may be brought into a state of servitude by capture; but, if they afterwards escape, and return to their own people, they obtain again their former state.*

De occupatione eorum, quæ in littore inveniuntur.

§ XVIII. Item lapilli, et gemmæ, et cætera, quæ in littore maris inveniuntur, jure naturali statim inventoris fiunt.

§ 18. *Precious stones, gems and other things, found upon the seashore, become instantly by the law of nations, the property of the finder.*

De fœtu animalium.

§ XIX. Item ea, quæ ex animalibus dominio tuo subjectis nata sunt, eodem jure tibi acquiruntur.

§ 19. *The product of those animals, which are reduced to our subjection, becomes by the same law, our own.*

De alluvione.

§ XX. Præterèa, quod per alluvionem agro tuo flumen adjecit, jure gentium tibi acquiritur. Est autem alluvio incrementum latens. Per alluvionem autem id videtur adjici, quod ita paulatim adjicitur, ut intelligi non possit, quantum quovue temporis momento adjiciatur.

§ 20. *Moreover, that ground which a river hath added to your estate by alluvion, becomes your own by the law of nations. And that is said to be* alluvion, *which is added so gradually, that no one can judge how much is added at each moment of time.*

De vi fluminis.

§ XXI. Quod si vis fluminis de tuo prædio partem aliquam detraxerit, et vicini prædio attulerit, palàm est, eam tuam permanere : planè si longiore tempore fundo vicini tui hæserit ; arboresque, quas secum traxerit, in eum fundum radices egerint ; ex eo tempore videntur vicini fundo aequisitæ esse.

§ 21. *But, if the impetuosity of a river should sever a part of your estate, and adjoin it to that of your neighbour, it is certain, such part would still continue yours ; but, if it should remain, for a long time, joined to the estate of your neighbour, and the trees, which accompanied it, take root in his ground, such trees seem, from the time of taking root, to be acquired to his estate.*

De insulâ.

§ XXII. Insula, quæ in mari est (quod rarò accidit) occupantis fit : nullius enim esse creditur. At insula in flumine nata (quod frequenter accidit) si quidem mediam partem fluminis tenet, communis est eorum, qui ab utrâque parte fluminis prope ripam prædia possident, pro modo scilicet latitudinis cujusque prædii, quæ prope ripam sit : quod si alteri proximior sit parti, eorum est tantum, qui ab eâ parte prope ripam prædia possident. Quod si qua parte divisum sit flumen, deinde infra unitum agrum alicujus in formam insulæ redegerit, ejusdem

§ 22. *When an island rises in the sea, (which rarely happens) the property of it is in the occupant ; for before occupation, it is in no one. But if an island rises in a river, (which frequently happens) and is placed exactly in the middle of it, such island shall be in common to them, who possess the lands near the banks on each side of the river, in proportion to the extent of each man's estate adjoining the banks. But, if the island is nearer to one side than the other, it belongs to them only, who possess lands next to the banks on that side, to which the island is*

permanet is ager, cujus et fuerat.

nearest. But, if a river divides itself and afterwards unites again, having reduced a tract of land into the form of an island, the land still continues to be the property of the former owner.

De alveo.

§ XXIII. Quod si, naturali alveo in universum derelicto, ad aliam partem fluere cœperit, prior quidem alveus eorum est, qui prope ripam ejus prædia possident; pro modò scilicet latitudinis cujusque agri, quæ prope ripam sit; novus autem alveus ejus juris esse incipit, cujus et ipsum flumen est, id est, publicus: quod si post aliquod tempus ad priorem alveum reversum fuerit flumen, rursùs novus alveus eorum esse incipit, qui prope ripam ejus prædia possident.

§ 23. *If a river, entirely forsaking its natural channel, hath began to flow elsewhere, the first channel appertains to those, who possess the lands close to the banks of it, in proportion to the extent of each man's estate next to such banks: and the new channel partakes of the nature of the river, and becomes public. And, if after some time the river returns to its former channel, the new channel again becomes the property of those who possess the lands contiguous its banks.*

De inundatione.

§ XXIV. Alia sanè causa est, si cujus totus ager inundatus fuerit; neque enim inundatio fundi speciem commutat: et ob id, si recesserit aqua, palàm est eum fundum ejus manere, cujus et fuit.

§ 24. *It is otherwise as to lands, which are overflowed only: for an inundation alters not the face and nature of the earth; and therefore, when the waters have receded, it is clear that the property will still remain in the same owner.*

De specificatione.

§ XXV. Cum ex alienâ materiâ species aliqua facta sit ab aliquo, quæri solet, quis eorum naturali ratione dominus sit: utrum is, qui fecerit, an potius ille, qui materiæ dominus fuerat: ut ecce, si quis ex alienis uvis, aut olivis, aut spicis, vinum, aut oleum, aut frumentum, fecerit; aut ex alieno

§ 25. *When a man hath made any* species, *or kind of work, with materials belonging to another, it is often asked, which ought, in natural reason, to be deemed the master of it: whether he who gave the form, or he, who owned the materials? as, if any person should make wine, oil or flower, from the grapes, olives, or*

auro, vel argento, vel ære, vas aliquod fecerit; vel ex alieno vino et melle mulsum miscuerit; vel ex medicamentis alienis emplastrum aut collyrium composuerit; vel ex alienâ lanâ vestimentum fecerit; vel ex alienis tabulis navem, vel armarium, vel subsellia, fabricaverit. Dt, post multam Sabinianorum et et Proculianorum ambiguitatem, placuit media sententia existimantium, si ea species ad priorem et rudem materiam reduci possit, eum videri dominium esse, qui materiæ dominus fuerit; si non possit reduci, eum potius intelligi dominum, qui fecerit; ut ecce, vas conflatum potest ad rudem materiam æris, vel argenti, vel auri, reduci: vinum autem, vel oleum, aut frumentum, ad uvas, vel olivas, vel spicas, reverti non potest: ac ne mulsum quidem ad vinum et mel resolvi potest. Quod si partim ex suâ materia, partim ex alienâ, speciem aliquam fecerit quis; veluti ex suo vino et alieno melle mulsum miscuerat; aut ex suis et alienis medicamentis emplastrum aut collyrium; aut ex suâ lanâ vestimentum fecerit; dubitandum non est, hoc casu, eum esse dominum, qui fecerit: cum non solùm operam suam dederit, sed et partem ejusdem materiæ præstiterit.

corn of another; cast a vessel out of gold, silver, or brass, belonging to another; make mead or mulse with the wine and honey of another; compose a plaster, or eye water with another man's medicines; make a garment with another's wool; or fabricate, with the timber of another, a bench, a ship, or a chest? After much controversy, between the Sabinians *and* Proculians, *we were best pleased with the middle opinion of those who thought that, if the species or manufactured article can be reduced to its former rude materials, then the owner of such materials is also to be reckoned the owner of the* species: *but, if the* species *can not be so reduced, then he, who made it, is understood to be the owner of it: for example; a vessel can easily be reduced to the rude mass of brass, silver, or gold, of which it was made; but wine, oil, or flower, cannot be converted into grapes, olives, or corn; neither can mulse be separated into wine and honey. But, if a man makes any species, partly with his own, and partly with the materials of another: as, if he should make mulse with his own wine, and another's honey; or a plaster or eye-water, partly with his own, and partly with another man's medicines; or should make a garment with an intermixture of his own wool with that of another; it is not to be doubted in such cases, but that he, who made the* species, *is master of it; since he not only gave his labour, but furnished also a part of the materials.*

De accessione.

§ XXVI. Si tamen alienam purpuram vestimento quo quis intertexuerit, licet pretiosior sit purpura, tamen accessionis vice cedit vestimento: et, qui dominus fuit purpuræ, adversus eum, qui surripuit, habet furti actionem et condictionem, sive ipse sit, qui vestimentum fecit, sive alius: nam extinctæ res licet vindicari non possint, condici tamen à furibus et quibusque aliis possessoribus possunt.

§ 26. *If any man shall have interwoven the purple of another into his own vestment, then the purple, although more valuable, appertains to the vestment by accession: and the owner of the purple, may have an action of theft, and a personal action, called a* condiction, *against the purloiner; whether the vestment was made by him, or by another: for although things, which become, as it were, extinct by the change of their form, can not be recovered identically, yet a* condiction *lies for the value of them, either against the thief, or any other possessor.*

De confusione.

§ XXVII. Si duorum materiæ voluntate dominorum confusæ sint, totum id corpus, quod ex confusione fit, utriusque commune est: veluti si qui vina sua confuderint, aut massas argenti vel auri conflaverint. Sed, etsi diversæ materiæ sint, et ob id propria species facta sit, fortè ex vino et melle mulsum, aut ex auro et argento electrum, idem juris est: nam et hoc casu, communem esse speciem, non dubitatur. Quod si fortuitò et non voluntate dominorum confusæ fuerint vel ejusdem generis materiæ, vel diversæ, idem juris esse placuit.

§ 27. *If materials belonging to two persons are mingled by mutual consent, the whole mass, is common to both proprietors: as if they shall have intermixed their wines, or melted together their gold or silver. The same rule obtains, if diverse substances are so incorporated, as to become one* species: *as when mulse is made with wine and honey; or electrum by fusing together gold and silver: here no doubt, the species becomes common: and so it is, when similar or even different substances, are incorporated fortuitously, without the consent of their proprietors.*

De commixtione.

§ XXVIII. Quod si frumentum Titii frumento tuo mistum fuerit, siquidem voluntate vestrâ, commu-

§ 28. *If the corn of* Titius *hath been mixed with yours by consent, the heap is in common; because the*

ne est; quia singula corpora, id est, singula grana, quæ cujusque propria fuerunt, consensu vestro communicata sunt. Quod si casu id mistum fuerit, vel Titius id miscuerit sine tuâ volnntate, non videtur commune esse: quia singula corpora in suâ substantiâ durant. Sed nec magis istis casibus commune fit frumentum, quam grex intelligitur esse communis, si pecora, Titii, tuis pecoribus mista fuerint. Sed, si ab alterutro vestrum, totum id frumentum retineatur, in rem quidem actio pro modo frumenti cujusque competit: arbitrio autem judicis continetur, ut ipse æstimet, quale cujusque frumentum fuerit.

single bodies or grains, which were the private property of each, are, with your consent, intermixed. But, if the intermixture were accidental, or if Titius *made it without consent, it then seems that the corn is not in common; because the grains still remain distinct, and in their proper substance; for corn, in such a case, no more becomes in common, than a flock would be, if the sheep of* Titius *should intermix with yours. But, if the whole quantity of corn should be retained by either of you, then an action* in rem *lies for each man's portion; and it is the duty of the judge to make an estimate of the quality, or value, of each portion.*

De his quæ solo cedunt. De ædificatione in suo solo ex alienâ materiâ.

§ XXIX. Cum in suo solo aliquis ex alienâ materiâ ædificaverit, ipse intelligitur dominus ædificii: quia omne, quod solo inædificatur, solo cedit. Nec tamen ideò is, qui materiæ dominus fuerat, desinit dominus ejus esse: sed tantisper neque vindicare eam potest, neque ad exhibendum de eâ re agere, propter legem duodecim tabularum, quâ cavetur, ne quis tignum alienum ædibus suis junctum eximere cogatur, sed duplum pro eo præstet, per actionem, quæ vocatur, *de tigno juncto.* Appellatione autem tigni, omnis materia significatur, ex qua ædificia fiunt. Quod ideò provisum est, ne ædificia rescindi necesse sit. Quod si aliquâ ex causâ dirutum sit ædificium, poterit materiæ dominus, si non fuerit duplum jam consequutus,

§ 29. *If a man hath raised a building upon his own ground with the materials of another, he is considered the proprietor: for every building is an accession to the ground upon which it stands. But, the owner of the materials, does not lose his right of ownership; for though he cannot demand them specifically, or bring an action for the exhibition of them; since it is provided, by a law of the twelve tables, that a person who has used the materials of another, cannot be compelled to separate them from the building; yet by the action,* de tigno juncto, *he may be obliged to pay double value: (all materials for building are comprehended under the general term* tignum.) *The above cited provision, in the law of the*

tunc eam vindicare, et ad exhibendum de ea re agere.

twelve tables, was made to prevent the demolition of buildings. But, if it happen, that in any case, a builaing should be dissevered, or pulled down, then the owner of the materials, if he hath not already obtained double the value of them, is not prohibited from claiming his identical materials, and to bring his action ad exhibendum.

De ædificatione ex suâ materiâ in solo alieno.

§ XXX. Ex diverso, si quis in alieno solo ex suâ materiâ domum ædificaverit, illius fit domus, cujus et solum est. Sed hoc casu, materiæ dominus proprietatem ejus amittit, quia voluntate ejus intelligitur esse alienata; utique si non ignorabat, se in alieno solo ædificare: et ideò, licet diruta sit domus, materiam tamen vindicare non potest. Certè illud constat, si, in possessione constituto ædificatore, soli dominus petat domum suam esse, nec solvat pretium materiæ et mercedes fabrorum, posse eum per exceptionem doli mali repelli; utiquè si bonæ fidei possessor fuerit, qui ædificavit. Nam scienti, solum alienum esse, potest objici culpa, quod ædificaverit temerè in eo solo, quod intelligebat alienum esse.

§ 30. *On the contrary, if a man shall have built with his own materials upon the ground of another, the edifice becomes the property of him to whom the ground belongs: in this case the owner of the materials loses his property, because he is understood to have made a voluntary alienation of it, if he knew he was building upon another's land; therefore, if the edifice should fall, or be pulled down, such person cannot, even then, claim the materials. But it is clear, that if the builder be in confirmed possession, and the proprietor of the ground should claim the edifice as his, and refuse to pay the price of the materials and the wages of the workmen, he may be repelled by an* exception *of* fraud: *provided the builder was in possession* bonâ fide. *Otherwise it might be fairly objected,* "*that he had built rashly upon that ground, which he knew to be the property of another.*"

De plantatione.

§ XXXI. Si Titius alienam plantam in solo suo posuerit, ipsius erit;

§ 31. *If* Titius *sets another man's plant in his own ground, the plant*

et ex diverso, si Titius suam plantam in Mævii solo posuerit, Mævii planta erit; si modo utroque casu radices egerit: ante enim quam radices egerit, ejus permanet, cujus fuerat. Adeò autem ex eo tempore, quo radices egerit planta, proprietas ejus commutatur, ut, si vicini arbor ita terram Titii presserit, ut in ejus fundum radices egerit, Titii effici arborem dicamus: ratio enim non patitur, ut alterius arbor esse intelligatur, quam cujus in fundum radices egerit: et ideò, circa confinium arbor posita, si etiam in vicini fundum radices egerit, communis fit.

will belong to Titius: *on the contrary, if* Titius *shall have set his own plant in* Mævius's *ground, the plant will belong to* Mævius; *provided in either case, it hath taken root; for, until then, the property remains in him who planted it. But from the instant it hath taken root, the property is changed: so that, if the tree of a neighbour borders so closely upon the ground of* Titius, *as to take root in it,* and be wholly nourished there, *we may affirm, that such tree is become the property of* Titius: *for reason doth not permit, that a tree should be deemed the property of any other, than of him, in whose ground it hath rooted: therefore, if a tree, planted near the bounds of one person, shall also extend its roots into the lands of another, it will become common to both.*

De satione.

§ XXXII. Quâ ratione autem plantæ, quæ terræ coalescunt, solo cedunt, eadem ratione frumenta quoque, quæ sata sunt, solo cedere intelliguntur. Cæterum sicut is, qui in alieno solo ædificavit, si ab eo dominus petat ædificium, defendi potest per exceptionem doli mali, secundùm ea, quæ diximus; ita ejusdem exceptionis auxilio, tutus esse potest is, qui alienum fundum suâ impensâ bonâ fide consevit.

§ 32. *As plants appertain to the soil, in which they have rooted, so grain also is understood to follow the property of that ground, in which it is sowed. But as he, who hath built upon the ground of another, may (according to what we have said) be defended by an* exception *of* fraud, *if the proprietor of the ground should demand the edifice; so he, who at his own expense and* bonâ fide *hath sowed in another man's land, may also be benefitted by the help of this exception.*

De scriptura.

§ XXXIII. Literæ quoque, licet aureæ sint, perindè chartis mem-

§ 33. *As whatever is built upon, or sowed in the ground, belongs to*

branisve cedunt, ac solo cedere solent ea, quæ inædificantur, aut inseruntur. Ideòque, si in chartis membranisve tuis carmen vel historiam vel orationem Titius scripserit, hujus corporis non Titius, sed tu dominus esse videris. Sed, si à Titio petas tuos libros, tuasve membranas, nec impensas scripturæ solvere paratus sis, poterit se Titius defendere per exceptionem doli mali, utique si earum chartarum membranarumve possessionem bona fide nactus est.

that ground by accession; so letters also, although written with gold, appertain to the paper or parchment, upon which they are written. And therefore, if Titius *shall have written a poem, a history, or an oration, upon your paper or parchment, then you and not* Titius *will be deemed the owner of the written paper. But if you demand the books or parchments from* Titius, *and refuse to defray the expense of the writing, then* Titius *can defend himself by an* exception *of* fraud: *allowing that he obtained possession of such papers and parchments* bonâ fide.

De picturâ.

§ XXXIV. Si quis in alienâ tabulâ pinxerit, quidam putant tabulam picturæ cedere: aliis videtur, picturam (qualiscunque sit) tabulæ cedere: sed nobis videtur meliùs esse, tabulam picturæ cedere: ridiculum est enim, picturam Apellis vel Parrhasii in accessionem vilissimæ tabulæ cedere. Undè, si à domino tabulæ imaginem possidente is, qui pinxit, eam petat, nec solvat pretium tabulæ, poterit per exceptionem doli mali submoveri. At, si is, qui pinxit, eam possidea:, consequens est, ut utilis actio domino tabulæ adversus eum detur: quo casu, si non solvat impensam picturæ, poterit per exceptionem doli mali repelli: utique si bonæ fidei possessor fuerit ille, qui picturam imposuit. Illud enim palàm est, quod

§ 34. *If any man shall have painted upon the tablet of another, some think, that the tablet should yield to the picture; others, that the picture (whatever the quality of it may be) should accede to the tablet. To us it seems the better opinion, that the tablet should accede to the picture; for it is ridiculous, that the painting of an* Apelles, *or a* Parrhasius, *should yield as an accession, to a worthless tablet. But if the painter demand the tablet, from the owner and possessor, without offering the price of it, then such demandant may be defeated by an* exception *of* fraud: *but, if the painter is in possession of the picture, the owner of the tablet is intitled to an action called* utilis, *i. e.* beneficial; *in which case, if the owner of the tablet demands it, and does*

sive is, qui pinxit, surripuit tabulas, sive alius, competit domino tabularum furti actio.

not tender the value of the picture, he may also be repelled by an exception *of* fraud, *provided the painter obtained possession fairly. But, if he, or any other, shall have taken away the tablet feloniously, it is evident, that the owner may prosecute by any action of theft.*

De fructibus bonâ fide perceptis.

§ XXXV. Si quis à non domino, quem dominum esse crediderit, bonâ fide fundum emerit, vel ex donatione, aliave qualibet justa causâ, æque bonâ fide acceperit, naturali ratione placuit, fructus, quos percepit, ejus esse pro culturâ et curâ: et ideò, si postea dominus supervenerit, et fundum vindicet, de fructibus ab eo consumptis agere non potest: ei verò, qui alienum fundum sciens possederit, non idem concessum est; itaque cum fundo etiam fructus, licet consumpti sint, cogitur restituere.

§ 35. *If any man shall have purchased or by any other means honestly acquired lands from another, whom he believed to be the true owner, when in fact he was not, it is agreeable to natural reason, that the fruits, which he shall have gathered, shall become his own, on account of his care in the culture: and therefore, if the true owner shall afterwards appear and claim his lands, he can have no action against the* bonâ fide *possessor, for produce consumed. But this exemption is not granted to him, who knowingly keeps possession of another's estate; and therefore, he is compellable to account for all the mesne profits together with the lands.*

De fructibus à fructuario et colono perceptis.

§ XXXVI. Is verò, ad quem usufructus fundi pertinet, non aliter fructuum dominus efficitur, quam si ipse eos perceperit; et ideò, licet maturis fructibus, nondùm tamen perceptis, decesserit, ad hæredes ejus non pertinent, sed domino proprietatis acquiruntur. Eadem ferè et de colono dicuntur.

§ 36. *The usufructuary of lands can gain no property in the fruits, until he hath actually gathered them; and therefore, if he should die, while the fruits, although ripe, are yet ungathered, they could not be claimed by his heirs, but would fall to the proprietor: and so in general, as to farmers.*

Quæ sunt in fructu.

§ XXXVII. In pecudum fructu etiam fœtus est, sicuti lac, pilus, et lana: itaque agni, hædi, et vituli, et equuli, et suculi, statim naturali jure dominii fructuarii sunt. Partus verò ancillæ in fructu non est; itaque ad dominum proprietatis pertinet. Absurdum enim videbatur, hominem in fructu esse; cum omnes fructus rerum natura gratiâ hominis comparâverit.

§ 37. *Among the produce of animals, we not only reckon milk, skins, and wool, but also their young; and therefore lambs, kids, calves, colts, and pigs, appertain by natural right to the usufructuary; but the offspring of a female slave cannot be thus considered, but belongs to the proprietor of such slave: for it seemed absurd, that man, should be enumerated among the articles of produce, seeing that for his use, nature hatn furnished all kinds of produce.*

De officio fructuarii.

§ XXXVIII. Sed, si gregis usumfructum quis habeat, in locum demortuorum capitum ex fœtu fructuarius submittere debet, (ut et Juliano visum est;) et in vinearum demortuarum vel arborum locum alias debet substituere. Rectè enim colere, et quasi bonus paterfamilias uti, debet.

§ 38. *He, who has the usufruct of a flock, ought (according to* Julian*) to preserve the original number intire, by supplying the deficiency out of the young; in like manner he ought to supply the place of dead vines, or trees; and cultivate and use the stock in all respects like a good and fair husbandman.*

De inventione thesauri.

§ XXXIX. Thesauros, quos quis in loco suo invenerit, divus Adrianus, naturalem æquitatem sequutus, ei concessit, qui eos invenerit; idemque statuit, si quis in sacro aut religioso loco fortuito casu invenerit. At, si quis in alieno loco, non data ad hoc opera, sed fortuitò invenerit, dimidium domino soli concessit, et dimidium inventori: et convenientèr, si quis in Cæsaris loco invenerit, dimidium inventoris, et dimidium esse Cæsaris, statuit. Cui conveniens est, ut, si

§ 39. *The emperor* Adrian, *in pursuance of natural equity, allowed any treasure, found in a man's own lands, to belong to the finder; he ordained the same as to things casually found, in a sacred or religious place. But, if a person, not making it his business to search, should fortuitously find treasure in the ground of another, he granted half to the proprietor of the soil, and half to the finder. And so, if any thing is found within the imperial demesnes, half shall appertain to the finder and*

quis in fiscali loco vel publico vel civitatis invenerit, dimidium ipsius esse debeat, et dimidium fisci, vel civitatis.

half to the emperor: likewise, if a man find any valuable thing in a place belonging to the treasury, the public, or the city, half shall appertain to the finder, and half to the treasury, the public, or the city.

De traditione. 1. Regula, ejusque ratio.

§ XL. Per traditionem quoque jure naturali res nobis acquiruntur: nihil enim tam conveniens est naturali æquitati, quam voluntatem domini, volentis rem suam in alium transferre, ratam haberi: et ideò, cujuscunque generis sit, corporalis res tradi potest, et à domino tradita, alienatur: itaque stipendiaria quoque et tributaria prædia eodem modo alienantur. Vocantur autem stipendiaria et tributaria prædia, quæ in provinciis sunt: inter quæ nec non et Italica prædia, ex nostrâ constitutione, nulla est differentia: sed, siquidem ex causâ donationis, aut dotis, aut quâlibet aliâ ex causâ, traduntur, sine dubio transferuntur.

§ 40. *Things are also acquired (according to the law of nature) by tradition or livery; for nothing is more conformable to natural equity, than to confirm the will of him, who is desirous to transfer his property to another; therefore corporeal things, of whatever kind, may be delivered; and, when delivered by the owner, are aliened.* Stipendiary *and* tributary *possessions, (such as those situated in the provinces,) may be aliened in the same manner: for between these, and the* Italian *estates, we have now taken away all distinction, so that, on account of a donation, a marriage-portion, or any other just cause,* stipendiary *and* tributary *possessions may undoubtedly be transferred by livery.*

2. Limitatio.

§ XLI. Venditæ verò res et traditæ, non aliter emptori acquiruntur, quam si is venditori pretium solverit, vel alio modo ei satisfecerit; veluti expromissore, aut pignore dato: quod, quamquam cavetur lege duodecim tabularum, tamen rectè dicitur et jure gentium, id est, jure naturali, id effici. Sed, si is, qui vendidit, fidem emptoris sequutus fue-

§ 41. *Things, although sold and delivered, are not acquired by the buyer, until he hath either paid or otherwise satisfied the seller for them; as by a bondsman or pledge. And, although this is so ordained by a law of the twelve tables, yet the same rule is rightly said to arise from the law of nations; that is, from the law of nature. But if the seller*

rit, dicendum est, statim rem emptoris fieri.

have given credit to the buyer, we must affirm, that the things become instantly the property of the latter.

3. Ampliatio.

§ XLII. Nihil autem interest, utrum ipse dominus tradat alicui rem suam, an voluntate ejus alius, cui ejus rei possessio permissa sit. Quâ ratione, si cui libera universorum negotiorum administratio permissa fuerit à domino, isque ex his negotiis rem vendiderit et tradiderit faciet eam accipientis.

§ 42. *It is the same whether the owner deliver the article himself, or another to whom the possession of it was intrusted, deliver it with the owner's consent. Hence, if the management of all business be committed by a proprietor to any person, who shall by virtue of his commission, sell and deliver goods, they will become the property of the receiver.*

Fictio brevis manus

De quasi traditione. Si traditio ex aliâ causâ præcesserit.

§ XLIII. Interdùm etiam, sinè traditione nuda voluntas domini sufficit ad rem transferendam; veluti si rem, quam tibi aliquis commodaverit, aut locaverit, aut apud te deposuerit, postea aut vendiderit tibi, aut donaverit, aut dotis nomine dederit: quamvis enim ex eâ causa tibi eam non tradiderit, eo tamen ipso, quod patitur tuam esse, statim tibi acquiritur proprietas, perindè ac si eo nomine tibi tradita fuisset.

§ 43. *In some cases, the consent of the proprietor without delivery is sufficient to transfer property: as when a person hath lent, hired, or deposited in your possession any thing, and hath afterwards sold it to you, made a donation of it, or given it to you as a marriage portion: for although not originally delivered for any of these purposes, yet, as soon as it becomes notoriously yours, you have instantly acquired the property; and that as fully, as if it had actually been delivered as a thing sold, a donation or a marriage portion.*

De traditione clavium.

§ XLIV. Item, si quis merces in horreo depositas vendiderit, simul atque claves horrei tradiderit emptori, transfert proprietatem mercium ad emptorem.

§ 44. *Also if a person hath sold merchandise, deposited in a storehouse, he is understood to have transferred the property, on delivering the keys of the store-house to the buyer.*

De missilibus.

§ XLV. Hoc ampliùs; interdum et in certam personam collata voluntas domini transfert rei proprietatem: ut eccè, prætores et consules, cum missilia jactant in vulgus, ignorant quid eorum quisque sit excepturus: et tamen, quia volunt, quod quisque acceperit, ejus esse, statim eum dominum efficiunt.

§ 45. *It also sometimes happens, that the property of a thing is transferred, by the master of it, to an incertain person: as when the prætors and consuls cast their* missilia, *or liberalities, among the people, they know not what any particular man will receive; yet, because it is their will, that what every man then receives shall be his own, it instantly becomes his property.*

De habitis pro derelicto.

§ XLVI. Quâ ratione veriùs esse videtur, si rem pro derelicto à domino habitam occupaverit quis, statim eum dominum effici. Pro derelicto autem habetur, quod dominus eâ mente abjecerit, ut id in numero rerum suarum esse nolit: ideòque statim dominus ejus esse desinit.

§ 46. *By parity of reason it appears that whatever hath been made a* derelict *by the owner, will become the property of the first occupant. Whatever hath been thrown away, or abandoned by the owner, with intent, that it might no longer be reckoned among his possessions, is accounted a* derelict: *and ceases to be his property.*

De jactis in mare levandæ navis causâ Item de his, quæ de rhedâ currente cadunt.

§ XLVII. Alia sanè causâ est earum rerum, quæ in tempestate levandæ navis causâ ejiciuntur: hæ enim dominorum permanent: quia palàm est, eas non eo animo ejici, quod quis eas habere nolit, sed quo magis cum ipsa navi maris periculum effugiat. Quâ de causâ, si quis eas fluctibus expulsas, vel etiam in ipso mari nactus, lucrandi animo abstulerit, furtum committit. Nec longè videntur discedere ab his, quæ de rhedâ currente, non intelligentibus dominis, cadunt.

§ 47. *But the law is not so in respect of things thrown overboard, in a storm, to lighten a vessel: for they remain the property of the owners; seeing it is evident, that they were not thrown away, through dislike, but that persons in the ship might avoid the dangers of the sea. Hence whoever with a selfish intention, hath taken up such goods, although found upon the high sea, he is guilty of theft. And, goods, which have dropped from a carriage in motion, without the knowledge of the owner, may be considered in the same light.*

TITULUS SECUNDUS.

DE REBUS CORPORALIBUS ET INCORPORALIBUS.

Secunda rerum divisio.

QUÆDAM præterea res corporales sunt, quædam incorporales. Corporales hæ sunt, quæ sui naturâ tangi possunt; veluti fundus, homo, vestis, aurum, argentum, et denique aliæ res innumerabiles. Incorporales autem sunt, quæ tangi non possunt: qualia sunt ea, quæ in jure consistunt; sicut hæreditas, ususfructus, usus, et obligationes, quoque modo contractæ. Nec ad rem pertinet, quod in hæreditate res corporales continentur: nam et fructus, qui ex fundo percipiuntur, corporales sunt: et id, quod ex aliquâ obligatione nobis debetur, plerumque corporale est; veluti fundus, homo, pecunia: nam ipsum jus hæreditatis, et ipsum jus utendi, fruendi, et ipsum jus obligationis, incorporale est. Eodem numero sunt et jura prædiorum urbanorum et rusticorum, quæ etiam servitutes vocantur.

Moreover some things are corporeal *others* incorporeal. *Things* corporeal *are tangible; as, lands, slaves, vestments, gold, silver, and others, innumerable. Things* incorporeal *are those, which are not tangible, but consist in rights and privileges; as inheritances, usufructs, uses, and all obligations however contracted: nor is it an objection that things* corporeal *are contained in an inheritance; for fruits, gathered from the earth, are* corporeal; *and that also is generally* corporeal, *which is due to us upon an obligation; as a field, a slave, or money: for, the* right *to an inheritance, the* right *of using and enjoying any particular thing, and the* right *of an obligation, are undoubtedly* incorporeal. *To these may be added the* rights, *(or qualities,) of rural and city estates, termed* services.

TITULUS TERTIUS.

DE SERVITUTIBUS RUSTICORUM ET URBANORUM PRÆDIORUM.

D. viii. T. 1. et 2. C. iii. T. 34.

De servitutibus rusticis.

RUSTICORUM prædiorum jura sunt hæc: iter, actus, via, aquæductus. Iter est jus eundi, ambulandi, hominis; non etiam jumentum agendi vel vehiculum. Actus est, jus agendi jumentum vel vehiculum. Itaque, qui habet iter, actum non habet: sed, qui actum habet, et iter habet, eoque uti potest etiam sinè jumento. Via est jus eundi, et agendi, et ambulandi: nam iter et actum, via in se continet. Aquæductus est jus aquæ ducendæ per fundum alienum.

The rights or services of rural estates are these; a path, Iter; *a road,* actus; *an highway,* via; *and an* aqueduct *or free passage for water. A path is the right of passing and repassing on foot over another man's ground, but not of driving cattle or a carriage over it. A* road *implies the liberty of driving either cattle or carriages: hence he who hath a* path, *hath not a* road: *but he, who hath a* road, *hath inclusively a* path; *for he may use such* road, *when he doth not drive cattle. A* highway *imports the right of passing, driving cattle, &c. and includes in it both a* path *and a* road: *and an* aqueduct *imports the right of leading water, through the grounds of another.*

De servitutibus urbanis.

§ I. Prædiorum urbanorum servitutes sunt hæ, quæ ædificiis inhærent; ideò urbanorum prædiorum dictæ, quoniam ædificia omnia urbana prædia appellamus, etsi in villa ædificata sunt. Item urbanorum prædiorum servitutes sunt hæ; ut vicinus onera vicini sustineat: ut in parietem ejus liceat vicino tignum immittere: ut stillicidium, vel flumen, recipiat quis in ædes suas, vel

§ 1. *The services of city-estates are such as appertain to buildings: they are so called because we call all edifices, city-estates, although built upon farms or in villages. It is required by city-services, that neighbours should bear the burdens of neighbours; and by such services, one neighbour may be permitted to place a beam upon the wall of another; may be compelled to receive*

in aream, vel in cloacam, vel non recipiat: et ne altiùs quis tollat ædes suas, ne luminibus vicini officiat.

the droppings and currents from the gutter-pipes of another man's house, upon his own house, area, or sewer; or may be exempted from receiving them; or may be restrained from raising his house, so as to darken the habitation of his neighbour.

De reliquis servitutibus rusticis.

§ II. Inter rusticorum prædiorum servitutes quidam computari rectè putant aquæ haustum, pecoris ad aquam appulsum, jus pascendi, calcis coquendæ, arenæ fodiendæ.

§ 2. *Some rightly judge, that, among rural services, we ought to reckon the right of drawing water, watering and feeding cattle, burning lime, digging sand, &c. in the ground of another.*

Qui servitutem debere vel acquirere possunt.

§ III. Ideò autem hæ servitutes prædiorum appellantur, quoniam sinè prædiis consistere non possunt. Nemo enim potest servitutem acquirere urbani vel rustici prædii, nisi qui habet prædium; nec quisquam debere, nisi qui prædium habet.

§ 3. *All these are called the services of estates; because they cannot be constituted without an estate to support them; for no man can either owe, or acquire, a rural or city service, if he possess neither house or lands.*

Quibus modis servitus constituitur.

§ IV. Si quis velit vicino aliquod jus constituere, pactionibus atque stipulationibus id efficere debet. Potest etiam quis testamento hæredem suum damnare, ne altiùs tollat ædes suas, ne luminibus vicini officiat; vel ut patiatur eum tignum in parietem suum immittere, stillicidiumve adversus eum habere; vel ut patiatur eum per fundum ire, agere, aquamve ex eo ducere.

§ 4. *When it is wished to demise the right of a service to another, it should be done by contract and stipulation. A man may also by testament prohibit his heir from heightening his house, lest he should obstruct the view of his neighbour; or may oblige him to permit the rafter of another man's house, to be laid upon his wall: or to receive upon his own house the droppings of another's; or suffer any person to walk, drive cattle, or draw water in his grounds.*

TITULUS QUARTUS.

DE USUFRUCTU.

D. vii. T. 1. C. iii. T. 33.

Definitio usus fructûs.

USUSFRUCTUS est jus alienis rebus utendi, fruendi, salva rerum substantiâ. Est autem jus in corpore, quo sublato, et ipsum tolli necesse est.

Usufruct, *is the right of using and enjoying, without consuming or destroying, things which are the property of another. It is a right over a corporeal substance; if the substance perish, the* usufruct *must cease.*

Quibus modis constituitur.

§ I. Usufructus à proprietate separationem recipit, idque pluribus modis accidit: ut eccè, si quis usumfructum alicui legaverit: nam hæres nudam habet proprietatem, legatarius vero usumfructum. Et contra, si fundum legaverit deducto usufructu, legatarius nudam habet proprietatem, hæres verò usumfructum. Item alii usumfructum, alii, deducto eo, fundum legare potest. Sine testamento verò si quis velit usumfructum alii constituere, pactionibus et stipulationibus id efficere debet. Ne tamen in universum inutiles essent proprietates, semper abscedente usufructu, placuit certis modis extingui usumfructum, et ad proprietatem reverti.

§ 1. *The* usufruct *may be in various ways separated from the property, as when it is bequeathed: for naked property only is then vested in the heir, while the legatee possesses the* usufruct; *it happens on the contrary, when a testator hath bequeathed his lands without the* usufruct; *for then the legatee hath only the bare property, while the heir enjoys the profits: for the* usufruct *may be bequeathed to one, and the lands, without the* usufruct, *to another. Yet, if any man would constitute an* usufruct *otherwise than by testament, he must do it by pact, and stipulation. But, lest the property of lands should be rendered wholly unbeneficial by deducting the* usufruct *for ever, it was thought convenient, that the* usufruct *should by certain means become extinguished, and revert to the property.*

Quibus in rebus constituitur.

§ II. Constituitur autem usus-fructus non tantùm in fundo et ædibùs, verum etiam in servis, et jumentis, et cæteris rebus; exceptis iis, quæ ipso usu consumuntur: nam hæ res neque naturali ratione neque civili, recipiunt usumfructum: quo in numero sunt, vinum, oleum, frumentum, vestimenta: quibus proxima est, pecunia numerata: namque ipso usu, assidua permutatione, quodammodo extinguitur. Sed utilitatis causâ Senatus censuit, posse etiam earum rerum usumfructum constitui, ut tamen eo nomine hæredi utilitèr caveatur: itaque, si pecuniæ ususfructus legatus sit, ita datur legatario, ut ejus fiat; et legatarius satisdet hæredi de tantâ pecuniâ restituendâ si morietur, aut capite minuetur. Cæteræ quoque res ita traduntur legatario, ut ejus fiant: sed æstimatis his satisdatur, ut, si moriatur aut capite minuatur, tanta pecunia restituatur, quanti hæ fuerint æstimatæ. Ergo Senatus non fecit quidem earum rerum usumfructum, (nec enim poterat,) sed per cautionem quasi usumfructum constituit.

§ 2. *The* usufruct *not only of lands and houses is grantable, but also of slaves, cattle, and other things; except those, which are consumed by use; for the* usufruct *of such things is neither grantable by civil policy, or natural reason; among these may be reckoned wine, oil, cloaths, &c. money is nearly of the same nature; for by constant use, and the frequent change of owners, it in a manner becomes extinct. But the senate, through a motive of public utility, hath ordained, that the* usufruct *of these things may be constituted, if sufficient security be given to the heir: and therefore, if the* usufruct *of money is bequeathed, the money is so given to the legatee, as to make it instantly his own: but then the legatee, lest he should die, or suffer diminution, is obliged to give security to the heir for the repayment of a like sum. Other things also, are so delivered to the legatee as to become his property; but in this case, after valuation, security must be given to the heir for the payment of that amount, either at the death of the legatee, or if he should suffer diminution. It is not therefore to be understood, that the senate hath created strict* usufruct *of these things, which is impossible; but a* quasi-usufruct *by means of a security.*

Quibus modis finitur.

§ III. Finitur autem usus-fructus morte usufructuarii, et duabus

§ 3. *The* usufruct *determines by the death of the usufructuary; and*

capitis diminutionibus, maximâ et mediâ, and non utendo per modum et tempus; quæ omnia nostra statuit constitutio. Item finitur ususfructus, si domino proprietatis ab usufructuario cedatur, (nam cedendo extraneo nihil agitur,) vel ex contrario, si usufructuarius proprietatem rei acquisiverit: quæ res consolidatio appellatur. Eo amplius constat, si ædes incendio consumptæ fuerint, vel etiam terræ motu, vel vitio suo corruerint, extingui usumfructum; et ne areæ quidem usumfructum deberi.

by two of the three namely, the greatest and the middle diminution, (or change of state;) and also by not being used, according to the manner, and during the time prescribed: all which is set forth in our constitution. The usufruct *also determines, if the usufructuary surrender it to the lord of the property; for a cession to a stranger is of no avail; or if the usufructuary hath acquired the property, which is called consolidation. And it is certain, if a house hath been consumed by fire, or thrown down by an earthquake, or fallen through decay, that the* usufruct *of such house is wholly destroyed; and that no* usufruct *of the area, or ground of it, enures to the usufructuary.*

Si finitus sit.

§ IV. Cum autem finitus fuerit totus usufructus, revertitur scilicet ad proprietatem; et, ex eo tempore, nudæ proprietatis dominus incipit plenam in re habere potestatem.

§ 4. *When the whole* usufruct *of a thing is determined, it then reverts to the property; and, from that time, the owner of the nude property begins to have full power over it.*

TITULUS QUINTUS.

DE USU ET HABITATIONE.

D. vii. T. 8. C. iii. T. 33.

Communia de usufructu et usu.

ISDEM illis modis, quibus usus-fructus constituitur, etiam nudus usus constitui solet: iisdem illis modis finitur, quibus et usufructus desinit.

The usufruct, *and the naked use of a thing, are constituted, and determined by the same means.*

Quid intersit inter usumfructum et usum fundi.

§ I. Minus autem juris est, in usu, quam in usufructu: nam is, qui fundi nudum habet usum, nihil ulterius habere intelligitur, quam ut oleribus, pomis, floribus, fœno, stramentis, et lignis, ad usum quotidianum utatur: inque eo fundo hactenùs ei morari licet, ut neque domino fundi molestus sit, neque iis, per quos opera rustica fiunt, impedimento: nec ulli alii jus, quod habet, aut locare, aut vendere, aut gratis concedere, potest; cum is, qui usumfructum habet, possit hæc omnia facere.

§ 1. Less right appertains to the use of a thing, than the usufruct; *for he, who has but the use of lands, is understood to have nothing more than the liberty of using so much of the herbs, fruit, flowers, hay, straw, and wood, as may be sufficient for his daily supply: and he is permitted to be commorant upon the land, on condition that he neither becomes troublesome to the owner, nor impedes the labours of the husbandmen. Neither can he let, sell, or give his right to another, which an usufructuary may.*

Ædium usus.

§ II. Item is, qui ædium usum habet, hactenùs jus habere intelligitur, ut ipse tantum inhabitet; nec hoc jus ad alium transferre potest: et vix receptum esse videtur, ut hospitem ei recipere liceat; sed cum uxore liberisque suis, item libertis, nec non personis aliis liberis, quibus non minus, quam servis utitur, habitandi jus habeat. Et conveni-

§ 2. He, who hath but the use of an house, is understood to have no other right than that of personal habitation: for he cannot transfer this right; and it is hardly thought allowable to receive a guest or a lodger. But he may inhabit the house with his wife, children, freed-men, and such other free persons as are servants. And, agreeably to this, if the use of a

enter, si ad mulierem usus ædium pertineat, cum marito ei habitare liceat.

house appertains to a woman, she may live in it with her husband, and her dependants.

De servi vel jumenti usu.

§ III. Item is, ad quem servi usus pertinet, ipse tantùm operâ atque ministerio ejus uti potest: ad alium verò nullo modo jus suum transferre ei concessum est. Idem scilicet juris est in jumento.

§ 3. *He also, who hath the use of a slave, can benefit only by the labour and service of such slave: for it is not in the power of the usuary to transfer his right. The same law prevails in regard to beasts of burden.*

De pecorum usu.

§ IV. Sed et, si pecorum vel ovium usus legatus sit, neque lacte, neque agnis, neque lanâ, utetur usuarius: quia ea in fructu sunt. Planè ad stercorandum agrum suum pecoribus uti potest.

§ 4. *If the use of cattle be devised, as of sheep; yet the usuary can neither use the milk, the lambs, or the wool; for these belong to the* usufruct. *But he may undoubtedly employ the sheep, in soiling his lands.*

De habitatione.

§ V. Sed, si cui habitatio legata, sive aliquo modo constituta sit, neque usus videtur, neque ususfructus, sed quasi proprium aliquod jus: quanquam habitationem habentibus, propter rerum utilitatem, secundum Marcelli sententiam, nostrâ decisione promulgatâ, permisimus non solum in eâ degere, sed etiam aliis locare.

§ 5. *An habitation, whether given by testament, or constituted by other means, seems neither an* use *nor an* usufruct, *but rather a* particular right. *And, for public utility and in conformity to the opinion of* Marcellus, *we have decided, that he, who hath an habitation, may not only live in it, but let it to another.*

Transitio.

§ VI. Hæc de servitutibus, et usufructu, et usu, et habitatione, dixisse sufficiat. De hæreditatibus autem et obligationibus suis locis proponemus. Exposuimus summatim, quibus modis jure gentium res

§ 6. *What hath been said, may suffice concerning real services, usufructs, uses and habitations. We shall treat of inheritances and obligations, in their proper places. Having already briefly explained how*

acquiruntur: modò videamus, quibus modis legitimo et civili jure acquiruntur.

things are acquired by the law of nations; let us now examine, how they are acquired by the civil law.

TITULUS SEXTUS.

DE USUCAPIONIBUS ET LONGI TEMPORIS PRESCRIPTIONIBUS.

D. xli. T. 3. C. vii. T. 31, et 33.

Præcipua usucapionis requisita. 1. Bona fides. 2. Possessio per tempus definitum continuata. 3. Justus titulus.

JURE civili constitutum fuerat, ut, qui bonâ fide ab eo, qui dominus non erat, cum crederet eum dominum esse, rem emerit, vel ex donatione, aliâve quâvis justâ causâ acceperit, is eam rem, si mobilis erat, anno ubique uno, si immobilis, biennio tantum in Italico solo, usucaperet: ne rerum dominia in incerto essent. Et, cum hoc placitum erat putantibus antiquioribus, dominis sufficere ad inquirendas res suas præfata tempora, nobis melior sententia resedit, ne domini maturiùs suis rebus defraudentur, neque certo loco beneficium hoc concludatur: et ideò constitutionem super hoc promulgavimus, quâ cautum est, ut res quidem mobiles per triennium; immobiles vero per longi temporis possessionem (id est, inter præsentes decennio, inter absentes viginti annis) usucapiantur. Et his modis, non solùm in Italiâ, sed etiam in omni terrâ, quæ nostro im-

By the civil law, whoever had fairly obtained a thing from one, whom he supposed the true owner, (although in reality he was not) and, if a moveable, had possessed it bonâ fide *for one year, either in* Italy *or the provinces; or, if immoveable, for two years within the limits of* Italy, *should prescribe to such thing by use: and this was held to be law, lest the dominion or property of things, should be uncertain. But although it was thought by ancient legislators, that these periods were sufficiently long to enable every owner to search after his property, yet a better opinion hath occurred to us, that the true owners be not defrauded, or too hastily excluded, by the circumscription of time and place, from recovering their just due: we have therefore provided, that things moveable may be prescribed to after the expiration of three years, and that a possession, during a long tract of*

perio gubernatur, dominia rerum, justâ causâ possessionis præcedente, acquirantur.

time, will also found a prescription to things immoveable: that is to say, ten years, if the parties are present, (i. e. in the province,) and twenty years if either of them be absent. Property may thus be acquired; not only in Italy, *but throughout our dominions, if the possession was honestly obtained at first.*

De his, quæ sunt extra commercium.

§ I. Sed aliquandò, etiamsi maximè quis bonâ fide rem possederit, non tamen illi usucapio ullo tempore procedit: veluti si quis liberum hominem, vel rem sacram, vel religiosam, vel servum fugitivum, possideat.

§ 1. *But in some cases, although there hath been possession incontestably* bonâ fide, *yet no length of time will be sufficient to found a prescription; as when a man holds a free person, a thing sacred or religious, or a fugitive slave.*

De rebus furtivis, et vi possessis.

§ II. Furtivæ quoque res, et quæ vi possessæ sunt, nec, si prædicto longo tempore bonâ fide possessæ fuerint, usucapi possunt: nam furtivarum rerum, lex duodecim tabularum, et lex Atilia, inhibent usucapionem; vi possessarum lex Julia et Plautia. Quod autem dictum est, furtivarum et vi possessarum rerum usucapionem per leges prohibitam esse, non eò pertinet, ut ne ipse fur, quive per vim possidet, usucapere possit, (nam his aliâ ratione usucapio non competit; quia scilicet malâ fide possident,) sed ne ullus alius, quamvis ab eis bona fide emerit, vel ex aliâ causa acceperit, usucapiendi jus habeat. Unde in rebus mobilibus non facilè procedit, ut bonæ fidei possessoribus usucapio competat. Nam, qui sciens ali-

§ 2. *No prescription lies for things that have been stolen; or seized by violence; although they have been possessed* bonâ fide, *during the length of time required by our constitution: for prescription to things stolen is prohibited by a law of the twelve tables, and by the law* Atilia; *and the laws* Julia *and* Plautia *forbid a prescription to things seized by violence. And it is not to be inferred from these laws, that a thief, or disseizor only, is prohibited from taking by prescription: (for such are also prohibited because they are fraudulent possessors;) but all others likewise; although they shall have purchased such things* bonâ fide, *or otherwise fairly received them: hence things moveable can not easily be prescribed to, even by ho-*

enam rem vendiderit, vel ex aliâ causa tradiderit, furtum ejus committit. Sed tamen id aliquandò aliter se habet. Nam, si hæres rem defuncto commodatam, aut locatam, vel apud eum depositam, existimans hæreditariam esse, bonâ fide accipienti vendiderit, aut donaverit, aut dotis nomine dederit, quin is, qui acceperit, usucapere possit, dubium non est: quippè cum ea res in furti vitium non ceciderit; cum utique hæres, qui bonâ fide tanquam suam alienaverit, furtum non committat. Item, si is, ad quem ancillæ ususfructus pertinet, partum suum esse credens vendiderit, aut si donaverit, furtum non committit. Furtum enim, sine effectu furandi, non committitur. Aliis quoque modis accidere potest, ut quis, sine vitio furti, rem alienam ad aliquem transferat, et efficiat, ut à possessore usucapiatur. Quod autem ad eas res, quæ solo continentur, expedit, jus ita procedit, ut, si quis loci vacantis possessionem, propter absentiam aut negligentiam domini, aut quia sine successore decesserit, sine vi nanciscatur, quamvis ipse malâ fide possideat, (quia intelligit, se alienum fundum occupasse) tamen, si alii bonâ fide accipienti tradiderit, poterit ei longa possessione res acquiri; quia neque furtivum, neque vi possessum, acceperit. Abolita est enim quorundam veterum sententia existimantium, etiam fundi locive

nest possessors: for whoever hath knowingly sold or transferred the goods of another upon whatever consideration, is guilty of theft. But this rule admits of some cases wherein a moveable may be prescribed to: thus if an heir, supposing a particular thing to be hereditary, which in reality had only been lent, let to, or deposited with the deceased, shall have sold, bestowed, or given it as a portion, the bonâ fide *receiver may no doubt prescribe; for this can never be reputed* stolen, *inasmuch as the heir, who aliened it, believing it his own, committed no theft. So if he, who hath the usufruct of a female slave, sell or give away her child believing it to be his property, he does not commit theft; for theft implies an intention to commit it. It may also happen, by various means, that one man may transfer the property of another without theft, and give a right of prescription to the possessor. As to things immoveable the law ordains, that, if any man should take possession of an estate without force, by reason either of the absence, or negligence of the owner, or because he died without heirs, and (although he hath thus possessed the land dishonestly) shall have made livery of it to another, who took it* bonâ fide, *the land by long possession may be acquired by such taker, who took neither a thing stolen, or seized, by violence: for the opinion of those ancient lawyers, who held,*

furtum fieri. Et eorum utilitati, qui res soli possident, principalibus constitutionibus prospicitur, ne cui longa et indubitata possessio debeat auferri.

that lands and things immoveable, might be stolen, is now abolished: and it is provided by the imperial constitutions, in favour of those who possess immoveable property, that a long and undoubted possession ought not to be taken away.

De vitio purgato.

§ III. Aliquandò etiam furtiva, vel vi possessa, res usucapi potest; veluti si in domini potestatem reversa fuerit: tunc enim, vicio rei purgato, procedit ejus usucapio.

§ 3. *A prescription may sometimes be founded even to things, stolen, or possessed by violence; as, when they fall again into the power of the true owner; for the taint of title being removed, prescription takes place.*

De re fiscali et bonis vacantibus.

§ IV. Res fisci nostri usucapi non potest: sed Papinianus scripsit, bonis vacantibus fisco nondum nuntiatis, bonæ fidei emptorem traditam sibi rem ex his bonis usucapere posse; et ita Divus Pius, et Divi Severus et Antoninus rescripserunt.

§ 4. *Things, which appertain to our treasury, cannot be acquired by prescription. But, it is held by* Papinian, *that a* bonâ fide *purchaser of escheats not yet certified, may prescribe for them after delivery. The emperors* Pius Severus *and* Antoninus *have issued their rescripts, conformable to this opinion.*

Regula generalis.

§ V. Novissimè sciendum est, rem talem esse debere, ut in se non habeat vitium, ut à bonæ fidei emptore usucapi possit, vel qui ex aliâ justâ causâ possidet.

§ 5. *It is lastly to be observed, that no taint of dishonesty must attach to the article, in order to enable a* bonâ fide *purchaser or possessor to prescribe for it.*

De errore falsæ causæ.

§ VI. Error autem falsæ causæ usucapionem non parit; veluti si quis, cum non emerit, emisse se existimans, possideat; vel, cum ei

§ 6. *A mistake of the cause of possession shall not give rise to prescription: as when the possessor imagines, he hath purchased, when he*

donatum non fuerit, quasi ex donato possi deat.

hath not purchased; or that the thing was a gift, when it was not given.

De accessione possessionis.

§ VII. Diutina possessio, quæ prodesse cœperat defuncto, et hæredi et bonorum possessori continuatur, licèt ipse sciat, prædium alienum esse. Quòd si ille initium justum non habuit, hæredi et bonorum possessori, licèt ignoranti, possessio non prodest. Quod nostra constitutio similitèr et in usucapionibus observari constituit, ut tempora continuentur.

§ 7. *A long possession, beneficially commenced in the life time of the deceased, is continued in favour of the heir or successor, although he may know that the estate is the property of another; but, if the possession commenced unjustly, it will avail neither the heir, nor the possessor, although ignorant of any fraud. It is in like manner enacted by our constitution, that the time of usucaption shall be continued. (That is from the deceased to his successor in things moveable.)*

§ VIII. Inter venditorem quoque et emptorem conjungi tempora, divi Severus et Antoninus rescripserunt.

§ 8. *The emperors* Severus *and* Antoninus *have enacted, that, the possession of the seller shall enure to the buyer.*

De his, qui à fisco, aut Imp. Augustæve domo, aliquid acceperunt.

§ IX. Edicto divi Marci cavetur, eum, qui à fisco rem alienam emit, si post venditionem quinquennium præterierit, posse dominum rei exceptione repellere. Constitutio autem divæ memoriæ Zenonis benè prospexit iis, qui à fisco per venditionem, aut donationem, vel alium titulum accipiunt aliquid; ut ipsi quidem securi statim fiant, et victores existant, sive experiantur, sive conveniantur: adversùs autem sacratissimum ærarium usque ad quadriennium liceat iis intendere, qui pro dominio vel hypotheca earum re-

§ 9. *It is provided by an edict of the emperor,* Marcus, *that, the purchaser of any thing from the treasury, after five years possession subsequent to the sale, may repel the former owner by an exception of prescription. But the emperor* Zeno, *of sacred memory, hath well provided by his constitution, that all those, who by sale, donation, or any other title, have received things from the public treasury, may instantly be secured in their possession, and made certain of success, whether they be plaintiffs or defendants: and those,*

rum, quæ alienatæ sunt, putaverint, sibi quasdam competere actiones. Nostra autem divina constitutio, quam nupèr promulgavimus, etiam de iis, qui à nostrâ vel venerabilis Augustæ domo aliquid acceperint, hæc statuit, quæ in fiscalibus alienationibus præfatæ Zenonianæ constitutionis continentur.



who claim either as proprietors or mortgagees of the things aliened, may bring suit against the treasury, at any time within four years. Our own sacred ordinance, lately promulged in favour of those, who receive any thing, from the private possessions either of our-self, or of the empress, adopts the regulations, contained in the above mentioned constitution of the emperor Zeno, *concerning fiscal alienations.*

TITULUS SEPTIMUS.

DE DONATIONIBUS.

D. xxxix. T. 5. et 6. C. viii. T. 54. Nov. 162.

De donatione.

EST et aliud genus acquisitionis, donatio. Donationum autem duo sunt genera; mortis causâ, et non mortis causâ.

Donation, or gift, is another mode of acquiring property; it is of two kinds; on account of death; and not on account of death.

De mortis causâ donatione.

§ I. Mortis causâ donatio est, quæ propter mortis fit suspicionem; cum quis ita donat, ut, si quid humanitùs ei contigisset, haberet is, qui accipit: sin autem supervixisset is, qui donavit, reciperet: vel si eum donationis pœnituisset, aut prior decesserit is, cui donatum sit. Hæ mortis causâ donationes, ad exemplum legatorum redactæ sunt per omnia: nam, cum prudentibus ambiguum fuerat, utrum donationis,

§ 1. *A donation* mortis causâ, *is made under apprehension of death: as when any thing is given upon condition, that, if the donor dies, the donee shall possess it absolutely; or return it, if the donor should survive; or should repent, of having made the gift; or, if the donee should die before the donor. Donations* mortis causâ, *are now reduced, as far as possible, to the similitude of legacies: for, when it was much*

an legati instar eam obtinere oporteret, (et utriusque causæ quædam habebat insignia,) et alii ad aliud genus eam retrahebant, à nobis constitutum est, ut per omnia ferè legatis connumeretur, et sic procedat, quemadmodùm nostra constitutio eam formavit. Et in summâ mortis causâ donatio est, cum magis se quis velit habere, quam eum, cui donat; magisque eum, cui donat, quam hæredem suum. Sic et apud Homerum Telemachus donat Piræo.

doubted by our lawyers, whether a donation mortis causâ *ought to be reputed as a gift, or as a legacy, inasmuch as, in some things, it partakes of the nature of both, we then ordained, that it should be considered in almost all respects as a legacy; and be made as our constitution directs. In short, a donation,* mortis causâ, *is then said to be made, when a man so gives, as to demonstrate, that he would rather possess the thing given himself, than that the donee should possess it; and yet, that the donee should possess it, rather than his own heir.*

The donation which Telemachus *makes to* Piræus *in* Homer, *is of this species.*

He (when *Piræus* ask'd for slaves, to bring
The gifts and treasures of the *Spartan* king)
Thus thoughtful answer'd:—those we shall not move,
Dark and unconscious of the will of *Jove.*
We know not yet the full event of all:
Stabb'd in his palace, if your prince must fall,
Us, and our house, if treason must o'erthrow,
Better a friend possess them, than a foe.
But on my foes should vengeance heav'n decree,
Riches are welcome then, not else, to me;
'Till then, retain the gifts.—

POPE'S *Odyss. lib.* 17.

De simplice inter vivos donatione.

§ II. Aliæ autem donationes sunt, quæ sine ullâ mortis cogitatione fiunt, quas inter vivos appellamus, quæ non omnio comparantur legatis: quæ, si fuerint perfectæ, temerè revocari non possunt. Perficiuntur autem, cum donator suam voluntatem scriptis aut sine scriptis manifestaverit. Et, ad exemplum

§ 2. *Donations, made without apprehension of death, called donations* inter vivos, *admit of no comparison with legacies: for, when once perfected, they cannot be rashly revoked; they are esteemed perfect, when the donor hath manifested his will either in writing or otherwise. And it is appointed by our constitution, that a*

venditionis, nostra constitutio eas etiam in se habere necessitatem traditionis voluit, ut, etiamsi non tradantur, habeant plenissimum et perfectum robur, et traditionis necessitas incumbat donatori. Et, cum retrò principum dispositiones insinuari eas actis intervenientibus volebant, si majores fuerant ducentorum solidorum, constitutio nostra eam quantitatem usque ad quingentos solidos ampliavit, quam stare etiam sine insinuatione statuit: sed et quasdam donationis invenit, quæ penitùs insinuationem fieri minime desiderant, sed in se plenissimam habent firmitatem. Alia insupur multa ad uberiorem exitum donationum invenimus, quæ omnia ex nostris constitutionibus, quas super his exposuimus, colligenda sunt. Sciendum est tamen, quod, etsi plenissimæ sint donationes, si tamen ingrati existant homines, in quos beneficium collatum est, donatoribus per nostram constitutionem licentiam præstitimus certis ex causis eas revocare; ne illi, qui suas res in alios contulerint, ab his quandam patiantur injuriàm vel jacturam, secundùm enumeratos in constitutione nostrâ modos.

donation inter vivos *shall, like a sale necessarily inforce a delivery; for when things are given, they become fully vested in the donee, and it is incumbent upon the donor to deliver them: and, although it is enacted by our predecessors, that donations, to the value of two hundred* solidi, *shall be formally registered, our ordinance enlarges this sum to five hundred* solidi, *and permits donations of less value to be binding without insinuation or inrollment; and it notices some donations, which are of full force without inrollment. We have also, for the enlargement of donations, enacted many other rules, which may be collected from our constitutions, on this subject. It nevertheless must be observed, that, a donation, validly made may be revoked on account of ingratitude in the donee in some particular cases: and this, lest a man should, in any of the instances enumerated in our constitution, suffer injury or damage from those upon whom he hath bestowed his property.*

De donatione ante nuptias vel propter nuptias.

§ III. Est et aliud genus inter vivos donationis, quod veteribus quidem prudentibus penitùs erat incognitum; postea autem à junioribus Divis Principibus introductum est, quod ante nuptias vocabatur, et tacitam in se conditionem habebat, ut tunc ratum esset, cum ma-

§ 3. *There is another kind of donations* inter vivos, *introduced by later Emperors, and wholly unknown to the ancient lawyers, termed donation before marriage, containing the tacit condition, that it should take effect, when the marriage was performed; these donations were pre-*

trimonium esset insecutum; idèoque ante nuptias vocabatur, quod ante matrimonium efficiebatur; et nunquam post nuptias celebratas talis donatio procedebat. Sed primus quidem Divus Justinus pater noster, cum augeri dotes et post nuptias fuerat permissum, si quid tale eveniret, et ante nuptias augeri donationem, et constante matrimonio, suâ constitutione permisit: sed tamen nomen inconveniens remanebat, cum ante nuptias quidem vocabatur, post nuptias autem tale accipiebat incrementum. Sed nos plenissimo fini tradere sanctiones cupientes, et consequentia nomina rebus esse studentes, constituimus, ut tales donationes non augeantur tantùm, sed etiam constante matrimonio initium accipiant: et non antè nuptias, sed proptèr nuptias, vocentur: et dotibus in hoc exæquentur, ut quemadmodùm dotes constante matrimonio non solùm augentur, sed etiam fiunt, ita et istæ donationes, quæ propter nuptias introductæ sunt, non solum antecedant matrimonium, sed eo etiam contracto augeantur et constituantur.

perly called ante nuptias, *because they could never be constituted after the celebration of matrimony. But, inasmuch as it was permitted by the ancient law, that portions might be augmented after marriage, the emperor* Justin, *our father, hath enacted by his constitution, that donations called* ante nuptias *might also be augmented at any time during matrimony: but, as it was improper, that a donation should be still termed* ante nuptias, *when it had received an augmentation* post nuptias, *and we being desirous, that our sanctions might be as perfect as possible, and that names should be properly adapted to things, have ordained that such donations may not only be augmented, but may commence also at any time during matrimony; and that for the future, they shall not be called donations* ante nuptias, *but donations* propter nuptias; *and thus they are made equal with portions; for as portions may be augmented, and even made, during matrimony, so donations, introduced on account of matrimony, may now not only precede marriage, but be augmented, or even constituted, after the celebration of it.*

De jure accrescendi.

§ IV. Erat olim et alius modus civilis acquisitionis per jus accrescendi, quod est tale; si, communem servum habens aliquis cum Titio, solus libertatem ei imposuerit, vel vindictâ vel testamento, eo casu pars ejus amittebatur, et socio accrescebat. Sed, cum pestimum fuerat exemplo, et libertate

§ 4. *There was formerly another manner of acquiring property by the civil law; namely by accretion; as, if* Primus *holding a slave in common with* Titius *had infranchised him, either by the* vindicta *or by testament, then would the share of* Primus *in that slave be lost, and accrue to* Titius. *But, inasmuch as it*

servum defraudari, et ex eo humanioribus quidem dominis damnum inferri, severioribus autem dominis lucrum accedere, hoc, quasi invidiâ plenum, pio remedio per nostram constitutionem mederi necessarium duximus; et invenimus viam, per quam manumissor, et socius ejus, et qui libertatem accepit, nostro beneficio fruantur, libertate cum effectu procedente, (cujus favore antiquos legum latores multa etiam contra communes regulas statuisse manifestùm est,) et eo, qui eam libertatem imposuit, suæ liberalitatis stabilitate gaudente, et socio indemni conservato, pretiumque servi secundùm partem dominii, quod nos definivimus, accipiente.

affords a bad example, that a man should be defrauded of his liberty, and that the most humane masters, should suffer loss, while the most severe receive emolument, we have thought it necessary, to administer a humane remedy to this grievance; and have devised means by which the manumittor, his co-partner, and the freed person, may all partake of our beneficence: for we have decreed, (and clearly our ancient legislators have often set aside the strict rules of law in favour of liberty,) that freedom, although granted by one partner only, shall immediately take effect: so that the manumittor shall have reason to be pleased with the validity of his gift, if his co-partner be indemnified by receiving his share of the worth of the slave.

TITULUS OCTAVUS.

QUIBUS ALIENARE LICET, VEL NON LICET.

De marito, qui, licet fundi dotalis dominus sit, alienare nequit.

ACCIDIT aliquandò, ut, qui dominus rei sit, alienare non possit: et contrà qui dominus non sit, alienandæ rei potestatem habeat. Nam dotale prædium maritus, invitâ muliere, per legem Juliam prohibetur alienare; quamvis ipsius sit, dotis causâ ei datum: quod nos, legem Juliam corrigentes, in meliorem statum deduximus. Cum enim lex in solis tantummodò rebus

Sometimes the proprietor of a thing may not alien it, while one who is not proprietor, may: for example, by the law Julia, *a husband is forbidden to alienate lands, which came to him in right of his wife, without her consent; although given to him, as a marriage portion. But, in this respect, we have corrected and amended the law* Julia; *for, as this law regards only possessions, situa-*

locum habebat, quæ Italicæ fuerant, et alienationes inhibebat, quæ invitâ muliere fiebant, hypothecas autem earum rerum etiam volente eâ utrique remedium imposuimus, ut etiam in eas res, quæ in provinciali solo positæ sunt, interdicta sit alienatio vel obligatio, ut neutrum eorum neque consentientibus mulieribus procedat : ne sexûs muliebris fragilitas, in perniciem substantiæ earum convertatur.

ted in Italy, *and although it inhibits the husband to mortgage such possessions, even with the consent of his wife, yet it permits him, with her consent to alienate, we have provided a remedy for both cases ; so that now, no husband can alien or mortgage, even with consent of his wife, any property* provincial, *or* Italian, *obtained with her, as a marriage portion ; lest the frailty of women should occasion the ruin of their fortunes.*

De creditore, qui, licet non sit dominus, tamen alienare pignus potest.

§ I. Contrà autem creditor pignus, ex pactione, quamvis ejus ea res non sit, alienare potest. Sed hoc forsitan ideò videtur fieri, quod voluntate debitoris intelligitur pignus alienari, qui ab initio contractûs pactus est, ut liceret creditori pignus vendere, si pecunia non solvatur. Sed, ne creditores jus suum persequi impedirentur, neque debitores temerè suarum rerum dominium amittere viderentur, nostrâ constitutione consultum est, et certus modus impositus est, per quem, pignorum distractio possit procedere ; cujus tenore utrique parti, creditorum et debitorum satis abundèque provisum est.

§ 1. *But a creditor, may by compact alien a pledge, although not his own property ; yet this seems no otherwise allowable, than because the pledge is understood to be alienated by consent of the debtor, who covenanted at the commencement of the contract, that the creditor might sell the pledge, if the loan was not repaid. But, lest creditors should be impeded from prosecuting their just claims, and debtors too hastily deprived of their property, it is provided for in our ordinance, and a certain method appointed, by which the sale of pledges may be made : and, ample care hath been taken, in respect both of creditors and debtors.*

De pupillo, qui, licet dominus, non tamen siné tutoris auctoritate alienare potest.

§ II. Nunc admonendi sumus, neque pupillum, neque pupillam, ullam rem sinè tutoris auctoritate alienare posse : ideòque, si mutu-

§ 2. *It must now be observed, that no pupil, male or female, can alien any thing without the authority of a tutor : and therefore, if a pupil,*

nam pecuniam sinè tutoris auctoritate alicui dederit, non contrahit obligationem: quia pecuniam non fecit accipientis: ideòque vindicari nummi possunt, sicubi extant. Sed, si nummi, quos mutuo minor dederit, ab eo, qui accepit, bonâ fide consumpti sunt, condici possunt: si malâ fide, ad exhibendum de his agi potest.

without such authority lend money to any man, the pupil acquires no obligation: for he cannot vest in the receiver the property of the money, which may be claimed by vindication, *if it still exist. But if money, lent by a minor, be consumed by the borrower,* bonâ fide, *(i. e. believing the lender was of full age) it may be recovered from such borrower by* condiction; *if* malâ fide, *an action* ad exhibendum *will lie against him.*

Continuatio.

§ III. At ex contrario omnes res pupillo et pupillæ sinè tutoris auctoritate rectè dari possunt: ideòque, si debitor pupillo solvat, necessaria est debitori tutoris auctoritas; alioquìn non liberabitur. Sed hoc etiam evidentissimâ ratione statutum est in constitutione, quam ad Cæsarienses advocatos ex suggestione Triboniani, viri eminentissimi, quæstoris sacri palatii nostri, promulgavimus: quâ dispositum est, ita licere tutori vel curatori debitorem pupillarem solvere, ut priùs judicialis sententia sinè omni damno celebrata, hoc permittat: quo subsecuto, si et judex pronunciaverit, et debitor solverit, sequatur hujusmodi solutionem plenissima securitas. Sin autem alitèr quam disposuimus, solutio facta fuerit, pecuniam autem salvam habeat pupillus, aut ex eâ locupletior sit, et adhuc eandem pecuniæ summam petat, per exceptionem doli mali poterit submoveri. Quod

§ 3. *On the contrary, property may be transferred to pupils, male or female, without the authority of their tutors: yet, if a debtor make payment to a pupil, he should be warranted by the authority of the tutor, otherwise he will not be acquitted of the debt: and this, for an evident reason; was ordained by a constitution, which we promulged to the advocates of* Cæsarea, *at the suggestion of that most eminent man* Tribonian, *the questor of our sacred palace: whereby it is enacted, that the debtor of a minor may pay over to the tutor or curator, under a judicial decree, permitting the payment previously obtained without expense to the minor: for, when the debt is paid under the decree of a judge, it is attended with the fullest security. But, although money hath been paid to a pupil, otherwise than we have ordained, yet, if he be really enriched by the payment, and hath preserved the money, and should after-*

si male consumpserit, aut furto aut vi amiserit, nihil proderit debitori doli mali exceptio, sed nihilominùs condemnabitur: quiâ temerè sinè tutoris auctoritate, et non secundùm nostram dispositionem, solverit. Sed ex diverso, pupilli vel pupillæ solvere sinè tutoris auctoritate non possunt: quiâ id, quod solvunt, non fit accipientis; cum scilicet nullius rei alienatio eis sinè tutoris auctoritate concessa sit.

wards require, that it should be repaid, he might be barred by an exception of fraud. But, if the pupil hath squandered the money, or lost it by theft or violence, an exception of fraud will be of no benefit to the debtor, who will be compelled to make a second payment; because the first was made inconsiderately without the authority of the tutor, and not according to our ordinance. Pupils may not pay money without the authority of their tutors; it does not vest as the property of the receiver: for without such authority, a pupil can alien nothing.

TITULUS NONUS.

PER QUAS PERSONAS CUIQUE ACQUIRITUR.

C. iv. T. 27.

Summa.

ACQUIRITUR vobis non solùm per vosmetipsos, sed etiam per eos, quos in potestate habetis: itèm per servos, in quibus usumfructum habetis: itèm per homines liberos, et per servos alienos, quos bonâ fide possidetis: de quibus singulis diligentiùs dispiciamus.

Things may be acquired not only by ourselves, but also by those, who are under our power; also by slaves, of whom we have the usufruct; by free-men; and by the slaves of others whom we possess bonâ fide. *Let us diligently investigate each of these cases.*

De liberis in potestate.

§ 1. Igitùr liberi vestri utriusque sexus, quos in potestate habetis, dùm quidem quicquid ad eos per-

§ 1. *Anciently whatever came to children, male or female, under power of their parents, was acquired*

venerat, (exceptis videlicèt castrensibus peculiis,) hoc parentibus suis acquirebant sine ullâ distinctione: et hoc ita parentum fiebat, ut etiam esset iis licentia quod per unum vel unam eorum acquisitum esset, alii filio, vel extraneo donare, vel vendere, vel, quocumque modo voluerant, applicare: quod nobis inhumanum visum est: et generali constitutione emissâ, et liberis pepercimus, et parentibus honorem debitum reservavimus: sancitum etenim à nobis est, ut, si quid ex re patris ei obveniat, hoc secundùm antiquam observationem totum parenti acquiratur: Quæ enim invidia est, quod ex patris occasione profectum est, hoc ad eum reverti? Quod autèm ex aliâ causâ sibi filiusfamilias acquisivit, hujus usumfructum patri quidem acquirat, dominium autem apud eum remaneat: ne, quod ei suis laboribus vel prosperâ fortunâ accesserit, hoc, in alium perveniens, luctuosum ei procedat.

for the parents without any distinction, if we except the peculium castrense: *and this so absolutely, that what was acquired by one child, the parent might have given to another, or to a stranger; or sold it, or applied it in what manner he thought proper: this seemed to be inhuman; and we have therefore, by a general constitution, mitigated the law as it respects children, and at the same time, supported that honour, which is due to parents; having ordained, that, if any thing accrue to the son by means of the father's fortune, the* whole *shall be acquired for the father, according to ancient practice: (for can it be unjust, that the wealth, which the son hath obtained, by means of the father, should revert to the father?) but that the acquisitions of the son by any other means, shall remain in the son; and that the father shall be entitled only to the usufruct of such acquisition; lest that, which hath accrued to a man from his labour or good fortune, being transferred to another, should affect him as a hardship.*

De emancipatione liberorum.

§ II. Hoc quoque à nobis dispositum est et in eâ specie, ubi parens, emancipando liberos suos, ex rebus, quæ acquisitionem effugiebant, sibi tertiam partem retinere (si voluerat) licentiam ex anterioribus constitutionibus habebat, quasi pro pretio quodammodò emancipationis: et inhumanum quiddam accidebat, ut filius rerum suarum ex hac emancipatione dominio pro ter-

§ 2. *We have made some regulations also as to emancipation: for a parent, when he emancipated his children, might, according to former constitutions, have taken to himself, if so inclined, the third part of those things, which were excepted from paternal acquisition, as the price of emancipation. But it appeared inhuman, that the son should be thus defrauded of the third part of*

tiâ parte defraudaretur; et, quod honoris ei ex emancipatione additum erat, quod sui juris effectus esset, hoc per rerum diminutionem decresceret. Ideòque statuimus, ut parens pro tertiâ parte dominii, quam retinere poterat, dimidiam non dominii rerum, sed ususfructûs, retineat. Ita etenim res intactæ apud filium remanebunt, et pater ampliore summâ fruetur, pro tertiâ, dimidiâ potiturus.

his property, and that the honour, which he had obtained by becoming independent, should be decreased by the diminution of his estate: we have therefore decreed, that the parent instead of the third part of the property, which he formerly might have retained, shall now be entitled to an half-share, not of the property, but of the ususfruct; so that the property will remain entire to the son, and the father will enjoy a greater share; namely, half instead of a third part.

De servis nostris.

§ III. Item vobis acquiritur, quod servi vestri ex traditione nanciscuntur, sivè quid stipulentur, sivè ex donatione, vel ex legato, vel ex quâlibet aliâ causâ, acquirant. Hoc enim vobis et ignorantibus et invitis obvenit; ipse enim servus, qui in potestate alterius est, nihil suum habere potest. Sed, si hæres institutus sit, non aliàs, nisi vestro jussu, hæreditatem adire potest, et, si vobis jubentibus adierit, vobis hæreditas acquiritur, perindè ac si vos ipsi hæredes instituti essetis: et convenientèr scilicet vobis legatum per eos acquiritur. Non solùm autem proprietas per eos, quos in potestate habetis, vobis acquiritur, sed etiam possessio: cujuscunque enim rei possessionem adepti fuerint, id vos possidere videmini. Undè etiam per eos usucapio, vel longi temporis possessio, vobis accidit.

§ 3. *Whatever your slaves have at any time acquired, whether by delivery, stipulation, donation, bequest, or any other means, is acquired by you; although you may be ignorant of, or even averse to, the acquisition; for he, who is a slave, can have no property. And, if a slave be made heir, he cannot otherwise take upon himself the inheritance, than at the command of his master; but, if commanded so to do, the inheritance is as fully acquired by the master, as if he had been himself made heir; and consequently a legacy, left to a slave, is acquired by his master. Moreover, masters acquire by their slaves not only the property of things, but also the possession; for whatever is possessed by a slave, is deemed to be possessed by his master; who may found a prescription to it, by means of his slave.*

De fructuariis et bonâ fide possessis.

§ IV. De iis autem servis, in quibus tantummodò usumfructum habetis ita placuit, ut, quicquid ex re vestrâ, vel ex operis suis, acquirunt, id vobis adjiciatur; quod verò extra eas causas consecuti sunt, id ad dominum proprietatis pertineat. Itaque, si is servus hæres institutus sit, legatumve quid ei, aut donatum fuerit, non usufructuario, sed domino proprietatis acquiritur.

§ 4. *As to slaves, of whom you have the usufruct only, it hath seemed right, that, whatever they earn by means of your goods, or by their own work and labour, appertains to you: but whatever they earn by other means, belongs to the proprietor: therefore, if a slave be made heir, or legatee, or donee, the inheritance, legacy, or gift, will not be acquired for the usufructuary master, but for the proprietor.*

Continuatio.

§ V. Idem placet et de eo, qui â vobis bonâ fide possidetur, sive is liber sit, sive alienus servus: quod enim placuit de usufructuario, idem placet et de bonæ fidei possessore. Itaque, quod extra istas duas causas acquiritur, id vel ad ipsum pertinet, si liber est, vel ad dominum, si servus est. Sed bonæ fidei possessor, cum usuceperit servum, (quia eo modo dominus fit,) ex omnibus causis per eum sibi acquirere potest. Fructuarius verò usucapere non potest: primùm quia non possidet, sed habet jus utendi, fruendi: deindè, quia scit, servum alienum esse. Non solùm autem proprietas per eos servos, in quibus usumfructum habetis, vel quos bonâ fide possidetis, aut per liberam personam, quæ bonâ fide vobis servit, vobis acquiritur, sed etiam possessio. Loquimur autem in utriusque personâ secundum distinctionem, quam proximè exposui-

§ 5. *The same rule is observed as to the* bonâ fide *possessor of a slave, whether he be a free-man, or the slave of another: for the same law prevails respecting an usufructuary master, and a* bonâ fide *possessor; therefore, whatever is acquired, otherwise than by the two causes above-mentioned, either belongs to the person possessed, if he be free; or to the proprietor, if he be a slave. But a* bonâ fide *possessor, who hath gained a slave by* usucaption *or prescription, (inasmuch as he thus becomes the absolute proprietor,) can acquire by means of such slave, by all manner of ways. But an usufructuary master can not prescribe; first, because he can not be strictly said to possess, having only the power of using: and because he knows, the slave belongs to another. We nevertheless may acquire not only property, but also possession, by means of slaves, whom we possess* bonâ fide, *or by*

mus, id est, si quam possessionem ex re vestrâ vel ex suis operis, adepti fuerint.

usufruct; and even by a free person, of whom we have bonâ fide *possession. But, in saying this, we adhere to the distinction, before explained, and speak of those things only, of which a slave may acquire the possession, either through the goods of his master, or by his own industry.*

De reliquis seu extraneis personis.

§ VI. Ex his itaque apparet, per liberos homines quos neque vestro juri subjectos habetis, neque bonâ fide possidetis, item per alienos servos, in quibus neque usumfructum habetis, neque possessionem justam, nullâ ex causâ vobis acquiri posse. Et hoc est, quod dicitur, per extraneam personam nihil acquiri posse; excepto eo, quod per liberam personam (velutì per procuratorem) placet non solùm scientibus, sed et ignorantibus, vobis acquiri possessionem, secundùm Divi Severi constitutionem; et per hanc possessionem etiam dominium, si dominus fuerit, qui tradidit; vel usucapionem aut longi temporis præscriptionem, si dominus non sit.

§ 6. *Hence it appears that you can not acquire by means of free persons, not under your subjection, or possessed by you* bonâ fide; *nor by the slave of another, of whom you have neither the usufruct, nor the just possession. And this is meant, when it is said, that nothing can be acquired by means of a stranger; except indeed according to the constitution of the emperor* Severus, *that possession may be acquired for you by a free person, as by a proctor, not only with, but even without your knowledge; and, by this possession, the property may be gained, if the delivery were made by the proprietor; and an usucaption or prescription may be acquired, although the delivery were made by one, who was not the proprietor.*

Transitio.

§ VII. Hactenùs tantispèr admonuisse sufficiat, quemadmodùm singulæ res vobis acquirantur: nam legatorum jus, quo et ipso singulæ res vobis acquiruntur, item fideicommissorum, ubi singulæ res vobis relinquuntur opportuniùs inferiore loco referemus. Videamus ita-

§ 7. *The observations already made, concerning the acquisition of things, may suffice for the present; for we shall treat more opportunely hereafter concerning the rights of legacies and trusts. We now proceed to shew, how things may be acquired* per universitatem, *that is, wholly*

que nunc, quibus modis per universitatem res vobis acquirantur. Si cui ergò hæredes facti sitis, sive cujus bonorum possessionem petieritis, vel si quem adrogaveritis, vel si cujus bona, libertatum conservandarum causâ, vobis addicta fuerint, ejus res omnes, ad vos transeunt. Ac priùs de hæreditatibus dispiciamus, quarum duplex conditio est; nam vel ex testamento, vel ab intestato, ad vos pertinent. Et priùs est, ut de his dispiciamus, quæ ex testamento vobis obveniunt; quâ in re necessarium est, initium de testamentis ordinandis exponere.

and in gross by one single acquisition: for example; if you are nominated heir, or seek possession of the goods of another, or arrogate one as your son, or if goods are adjudged to you for preserving the liberty of slaves; in all these cases, the entire inheritance passes to you. Let us therefore inquire into inheritances, which are twofold; for they proceed either from a testacy, or an intestacy. And first of those, which come by testament; and herein it will be necessary to begin by explaining the manner of making testaments.

TITULUS DECIMUS.

DE TESTAMENTIS ORDINANDIS.

D. xxviii. T. 1. C. vi. T. 23. Nov. 66. 119.

Etymologia.

TESTAMENTUM ex eo appellatur, quod testatio mentis sit.

A testament is so called from testatio; *because it testifies the determination of the mind.*

De antiquis modis testandi civilibus.

§ I. Sed, ut nihil antiquitatis penitùs ignoretur, sciendum est, olim quidem duo genera testamentorum in usu fuisse; quorum altero in pace et otio utebantur, quod *calatis comitiis* appellabant; altero, cum in prælium exituri essent, quod *procinctum* dicebatur. Accessit de-

§ 1. *But, lest ancient usage should be forgotten, it is necessary to observe, that formerly there were two kinds of testaments; one practiced in times of peace, and named* calatis comitiis; *because made in a full assembly of the people; and the other, when the people were going forth*

indè tertium genus testamentorum, quod dicebatur *per æs et libram*, scilicèt quod per emancipationem, id est, imaginariam quandam venditionem agebatur, quinque testibus et libripende, civibus Romanis puberibus, præsentibus, et eo, qui familiæ emptor dicebatur. Sed illa quidem priora duo genera testamentorum ex veteribus temporibus in desuetudinem abierunt: quod verò per æs et libram fiebat, licet diutiùs permanserit, attamen partim et hoc in usu esse desiit.

to battle, and this was the procinctum testamentum. *A third species was afterwards added, called* per æs et libram, *being effected by emancipation; which was an alienation, made by an imaginary sale in the presence of five witnesses, and the* libripens *or balance-holder, all citizens of* Rome, *above the age of fourteen: and also in the presence of him, who was called the* emptor familiæ, *or purchaser. The two former kinds of testaments, have been disused for many ages; and that, which was made* per æs et libram, *although it continued longer in practice, hath now ceased in part to be observed.*

De antiquâ testandi ratione prætoriâ.

§ II. Sed prædicta quidem nomina testamentorum, ad jus civile referebantur: postèa verò ex edicto prætoris, forma alia faciendorum testamentorum introducta est. Jure etenim honorario, nulla mancipatio desiderabatur, sed septem testium signa sufficiebant: cum jure civili, signa testium non essent necessaria.

§ 2. *These three kinds of testament, originated from the civil law; but afterwards another kind was introduced by the* honorary *or* prætorian *edict; whereby the signature of seven witnesses was decreed sufficient to establish a will without any emancipation or imaginary sale; but this signature of witnesses, was not required by the civil law.*

De conjunctione juris civilis et prætorii.

§ III. Sed, cum paulatim, tam ex usu hominum, quam ex constitutionum emendationibus, cœpit in unam consonantiam jus civile et prætorium jungi, constitutum est, ut, uno eodemque tempore, quod jus civile quodammodo exigebat, septem testibus adhibitis, et subscriptione testium, quod ex constitutionibus inventum est, et ex edic-

§ 3. *When the civil and prætorian laws began to be blended partly by usage, and partly by the emendation of imperial constitutions, it became a rule, that all testaments should be made at one and the same time according to the civil law; that they should be sealed by seven witnesses according to the prætorian law, and that they should also be subscribed*

to prætoris, signacula testamentis imponerentur: ita ut hoc jus tripertitum esse videatur: et testes quidem, eorumque præsentia, uno contextu, testamenti celebrandi gratiâ, à jure civili descendant: subscriptiones autem testatoris et testium ex sacrarum constitutionem observatione adhibeantur: signacula autem et testium numerus ex edicto prætoris.

by the witnesses, in obedience to the constitutions. Thus the law of testament seems to be tripartite: for the civil law requires witnesses *to make a testament valid, who must all be present at the same time without interval; the sacred constitutions ordain, that every testament must be* subscribed *by the testator and the witnesses; and the prætorian edict requires* sealing, *and settles the number of witnesses.*

Solemnitas addita à Justiniano.

§ IV. Sed his omnibus à nostrâ constitutione propter testamentorum sinceritatem, ut nulla fraus adhibeatur, hoc aditum est, ut, per manus testatoris vel testium, nomen hæredis exprimatur, et omnia secundùm illius constitutionis tenorem procedant.

§ 4. *To all these solemnities, we have enacted in additional security of testaments, and for the prevention of frauds, that the name of the heir shall be expressed, by the hand-writing, either of the testator, or of the witnesses; and that every thing shall be done in conformity to the tenor of our constitution.*

De annulis, quibus testamenta signantur.

§ V. Possunt autem omnes testes et uno annulo signare testamentum; (quid enim si septem annuli una sculpturâ fuerint?) secundùm quod Papiniano visum est. Sed et alieno quoque annulo, licet signare testamentum.

§ 5. *Every witness to a testament, according to* Papinian, *may use the same signet: for otherwise, what must be the consequence, if seven seals should happen all to bear the same device? It is also allowable to seal with the signet of another.*

Qui testes esse possunt.

§ VI. Testes autem adhiberi possunt ii, cum quibus testamenti factio est. Sed neque mulier, neque impubes, neque servus, neque furiosus, neque mutus, neque surdus, neque is, cui bonis interdictum est, neque ii, quos leges ju-

§ 6. *Those persons are good witnesses, who can legally take by testament: but no woman or minor under puberty, or slave; no person, mad, mute, or deaf; no interdicted prodigal; nor any, whom the laws, have reprobated and rendered intestable, can*

bent improbos intestabilesque esse, possunt in numerum testium adhiberi.

be admitted a witness to a testament.

De servo, qui liber existimabatur.

§ VII. Sed, cum aliquis ex testibus, testamenti quidem faciendi tempore, liber existimabatur, postea autem servus apparuit, tam Divus Adrianus Catoni, quam postea Divi Severus et Antoninus rescripserunt, subvenire se ex sua liberalitate testamento, ut sic habeatur firmum, ac si, ut oportebat, factum esset; cum, eo tempore, quo testamentum signaretur, omnium consensu hic testis liberi loco fuerit, nec quisquam esset, qui status ei quæstionem moveret.

§ 7. *If a witness, was regarded as free at the time of attesting, but afterwards appeared to have been then a slave, the emperor* Adrian, *in his rescript to* Cato, *and afterwards the emperors* Severus *and* Antoninus *by their rescript decreed, that they would aid such a defect in a testament, and confirm it equally as if the witness, at the time of sealing, was, in the estimation of all men, taken to be a free person, no one having made a question of his condition.*

De pluribus testibus ex eâdem domo.

§ VIII. Pater, nec non is, qui in potestate ejus est: item duo fratres, qui in ejusdem patris potestate sunt, utique testes in uno testamento fieri possunt: quia nihil nocet, ex unâ domo plures testes alieno negotio adhiberi.

§ 8. *A father, and a son under his power, or two brothers, under the power of the same father, may be witnesses to a testament: for nothing prevents several persons of the same family, being witnesses to the transaction of another person.*

De his, qui sunt in familiâ testatoris.

§ IX. In testibus autem non debet esse is, qui in potestate testatoris est. Sed, si filiusfamilias de castrensi peculio post missionem faciat testamentum, nec pater ejus rectè adhibetur testis, nec is, qui in potestate ejusdem patris est. Reprobatum est enim in eâ re domesticum testimonium.

§ 9. *No person under power of the testator can witness the testament. And if the son of a family devise his military estate after his dismission from the army, neither his father, nor any one under power of his father, can be a witness to the will. For, in this case, the law does not allow of a domestic testimony.*

De hærede.

§ X. Sed neque hæres scriptus, neque is, qui in ejus potestate est, neque pater ejus, qui eum habet in potestate, neque fratres, qui in ejusdem patris potestate sunt, testes adhiberi possunt; quia hoc totum negotium, quod agitur testamenti ordinandi gratiâ, creditur hodie inter testatorem et hæredem agi. Licet autem totum jus tale conturbatum fuerat, et veteres quidem familiæ emptorem, et eos, qui per potestatem ei conjuncti fuerant, à testamentariis testimoniis repellebant; hæredi autem, et iis, qui per potestatem ei conjuncti fuerant, concedebant testimonia in testamentis præstare: licet ii, qui id permittebant, hoc jure minimè abuti, eos debere suadèbant: tamen nos eandem observationem corrigentes, et, quod ab illis suasum est, in legis necessitatem transferentes, ad imitationem pristini familiæ emptoris, meritò nec hæredi, qui imaginem vetustissimi familiæ emptoris obtinet, neque aliis personis, quæ ei, (ut dictum est,) conjunctæ sunt, licentiam concedimus sibi quodammodo testimonia præstare: idcòque nec ejusmodi veteres constitutiones nostro codici inseri permisimus.

§ 10. *No heir nominated in the will, nor any person in subjection to him; nor his father, under whose power he is; nor his brothers under power of the same father, can be admitted witnesses; for the whole business of completing a testament, is at this day considered as transacted between the testator, and the real heir. But formerly there was great confusion; for although the ancients would never admit the testimony of the* emptor familiæ, *(nominal purchaser) or the supposed heir, nor of any one allied to him by subjection, yet they admitted that of the real heir, and of persons connected with him by subjection; and the only precaution taken, was, to exhort those persons not to abuse their privilege. We have corrected this practice; preventing by the coercion of law, that, which the ancient lawyers endeavoured to prevent by persuasion only: for we admit neither the real heir, who represents the* emptor familiæ *of the ancients, nor any person allied to him as a witness, to the testament, by which he is nominated. It is for this reason, that we have not suffered the old constitutions to be inserted in our Code.*

De legatariis et fideicommissariis, et his, qui sunt in eorum familiâ.

§ XI. Legatariis autem et fideicommissariis, quia non juris successores sunt, et aliis personis eis conjunctis, testimonium non dene-

§ 11. *But we refuse not the testimony of legatees and trustees, or of persons allied to them, because they are not successors by law: nay, by*

gamus: imò in quâdam nostrâ constitutione et hoc specialitèr eis concessimus; et multo magis iis, qui in eorum potèstate sunt, vel qui eos habent in potestate, hujusmodi licentiam damus.

our constitution, we have specially granted them this privilege; and we allow this still more readily to persons under their subjection, and to those, to whom they are subject.

De materia, in qua testamenta scribuntur.

§ XII. Nihil autem interest, testamentum in tabulis, an chartis, membranisve, vel in alia materia fiat.

§ 12. *It is immaterial, whether a testament be written upon a tablet of wax, upon paper, parchment, or any other substance.*

De pluribus codicibus.

§ XIII. Sed et unum testamentum pluribus codicibus conficere quis potest, secundùm obtinentem tamen observationem omnibus factis: quod interdum etiam necessarium est; veluti si quis navigaturus et secum ferre et domi relinquere judiciorum suorum contestationem velit: vel propter alias innumerabiles causas, quæ humanis necessitatibus imminent.

§ 13. *Any person may execute counter-parts of the same testament observing the prescribed forms. This is sometimes necessary; as when a man going a voyage, is desirous to carry his will with him, and to leave a counter-part at home for his better security. Innumerable other reasons for doing this may arise, according to the various necessities of mankind.*

De testamento nuncupativo.

§ XIV. Sed hæc quidem de testamentis, quæ scriptis conficiuntur, sufficiunt. Si quis autem sine scriptis voluerit ordinare jure civili testamentum, septem testibus adhibitis, et suâ voluntate coram eis nuncupatâ, sciat, hoc perfectissimum testamentum jure civili firmumque constitutum.

§ 14. *Thus much may suffice concerning written testaments. But if a man wishes to dispose of his effects by a nuncupative or unwritten testament, he may do so, if in the presence of seven witnesses, he verbally declares his will; and this will be a valid testament according to the civil law.*

TITULUS UNDECIMUS.

DE MILITARI TESTAMENTO.

D. xxix. T. 1. C. vi. T. 21.

In militum testamentis solemnitates remissæ.

SUPRADICTA diligens observatio in ordinandis testamentis militibus, propter nimiam imperitiam eorum, constitutionibus principalibus remissa est. Nam, quamvis ii neque legitimum numerum testium adhibuerint, neque aliam testamentorum solemnitatem observaverint, rectè nihilominus testantur, videlicèt cum in expeditionibus occupati sunt: quod meritò nostra constitutio introduxit. Quoquo enim modo voluntas ejus suprema inveniatur, sive scripta, sive sine scriptura, valet testamentum ex voluntate ejus. Illis autem temporibus, per quæ, citra expeditionum necessitatem, in aliis locis, vel suis ædibus, degunt, minimè ad vindicandum tale privilegium adjuvantur. Sed testari quidem, etsi filii-familiarum sint, propter militiam conceduntur: jure tamen communi, eâdem observatione et in eorum testamentis adhibenda, quam in testamentis paganorum proximè exposuimus.

The before-mentioned strict observance of formalities, in the construction of testaments, is dispensed with by the imperial constitutions, in favour of all military persons, on account of their unskilfulness in these matters. For, although they should neither call the legal number of witnesses, nor observe any other solemnity, yet they may make a good testament, if they are in actual service. This was introduced by our own ordinance with good reason; so that in whatever manner the testament of a military person is conceived, whether in writing, or not, it prevails according to his intention: but, when soldiers are not upon an expedition, and live in their own houses or elsewhere, they are by no means intitled to claim this privilege; but a soldier, on account of his profession is allowed to make a testament, although he is the son of a family: observing however, according to the general law, all the formalities, which are required of others in this respect.

Rescriptum Divi Trajani.

§ I. Planè de testamentis militum Divus Trajanus Catilio Severo ita rescripsit. *Id privilegium, quod militantibus datum est, ut quoquo modo facta ab his testamenta rata*

§ 1. *The emperor* Trajan *wrote, as follows, in his rescript to* Catilius Severus *concerning military testaments.* The privilege, given to military persons, that their testa-

sint, sic intelligi debèt, ut utique prius constare debeat, testamentum factum esse: quod et sine scriptura, et à non militantibus quoque, fieri potest. Si ergo miles, de cujus bonis apud te quæritur, convocatis ad hoc hominibus, ut voluntatem suam testaretur, ita locutus est, ut declararet quem vellet sibi hæredem esse, et cui libertatem tribueret; potest videri sine scripto hoc modo esse testatus, et voluntas ejus rata habenda est. Cæterum, si (ut plerumque sermonibus fieri solet) dixit alicui, ego te hæredem faciò, *aut,* bona mea tibi relinquo, *non oportet hoc pro testamento observari. Nec ullorum magis interest, quam ipsorum, quibus id privilegium datum est, ejusmodi exemplum non admitti. Alioqui non difficulter post mortem alicujus militis testes existerent, qui affirmarent, se audisse dicentem aliquem relinquere se bona, cui visum sit: et per hoc vera judicia subverterentur.*

ments, in whatever manner made, shall be valid, must be thus understood; it ought first to be apparent, that a testament was made in some manner: for a testament may be made without writing, by persons not military. And therefore, if it appear, that the soldier, concerning whose goods question is now made before you, did, in the presence of witnesses, purposely called, declare what person should be his heir, and to what slaves he would give liberty, he shall be reputed to have made his testament without writing, and his will shall be ratified. But, if it is only proved, that he said to some one, as it often happens in discourse, *I appoint you my heir*—or—*I leave you all my estate*, such words do not amount to a testament. Nor are any persons more interested than the soldiery, that words so spoken should not amount to a will; otherwise, witnesses might without difficulty be produced after the death of any military man, who would affirm, that they had heard him bequeath his estate, to whomever they please; and the true intentions might be defeated.

De surdo et muto.

§ II. Quinimo et mutus et surdus miles testamentum facere potest.

§ 2. *A soldier though mute and deaf, may yet make a testament.*

De militibus et veteranis.

§ III. Sed hactenùs hoc illis à principalibus constitutionibus conceditur, quatenùs militant et in castris degunt. Post missionem verò

§ 3. *This privilege was granted by the imperial constitutions to military men, to be enjoyed only during actual service, and while they lived*

veterani, vel extra castra alii, si faciant adhuc militantes testamentum, communi omnium civium Romanorum jure id facere debent. Et quod in castris fecerint testamentum non communi jure, sed quomodo voluerint, post missionem intra annum tantùm valebit. Quid ergò si intra annum quis decesserit, conditio autem hæredi adscripta post annum extiterit? an quasi militis testamentum valeat? Et placet valere quasi miltis.

in tents. For, if veterans after dismission, or soldiers out of camp, would make their testaments, they must pursue the forms required of all the citizens of Rome. *And, if a testament be made in camp, and the solemnities of the law are not adhered to, it will continue valid only for one year after dismission from the army. Suppose therefore, a soldier should die testate within a year after his dismission, and the condition, enjoined upon the heir should happen after the year, would his testament be valid? We answer, it would prevail as a military testament.*

De facto ante militiam testamento.

§ IV. Sed et, si quis ante militiam non jure fecit testamentum, et miles factus, et in expeditione degens, resignavit illud, et quædam adjecit sive detraxit, vel aliàs manifesta est militis voluntas, hoc valere volentis, dicendum est, valere hoc testamentum, quasi ex novâ militis voluntate.

§ 4. *If a man, before entering into the army, should make his testament irregularly, and afterwards, upon an expedition, open it for the purpose of adding, or striking out; or if he should otherwise make his intention manifest, that this testament should be valid, it must be pronounced so, by virtue of this republication.*

De milite arrogato vel emancipato.

§ V. Denique, et si in arrogationem datus fuerit miles, vel filiusfamilias emancipatus est, testamentum ejus quasi ex novâ militis voluntate, valet: nec videtur capitis diminutione irritum fieri.

§ 5. *If a soldier be given in arrogation, or, being the son of a family, be emancipated, his testament is equally valid, as if he had republished it by a new declaration: nor is it invalidated by his change of state.*

De peculio quasi castrensi.

§ VI. Sciendum tamen est, quod, cum ad exemplum castrensis peculii, tam anteriores leges, quam prin-

§ 6. *Be it known, that, since the ancient laws, as well as the later constitutions, have, in imitation of the*

cipales constitutiones, quibusdam quasi castrensia dederant peculia, et horum quibusdam permissum fuerat etiam in potestate degentibus testari, nostra constitutio, id latius extendens, permiserit omnibus in hujuscemodi peculiis testari quidèm, sed jure communi. Cujus constitutionis tenore perspecto, licentia est nihil eorum, quæ ad præfatum jus pertinent, ignorare.

military estates, given to some persons quasi *military estates, and have indulged some of these in the liberty of making testaments, while they were under power, our constitution still extending this privilege, hath permitted all persons, who possess these estates, to make their testaments, but according to the common forms of law. Whoever carefully peruses that constitution, may fully inform himself of all that relates to the before-mentioned privilege.*

TITULUS DUODECIMUS.

QUIBUS NON EST PERMISSUM FACERE TESTAMENTUM.

D. xxviii. T. 1. C. vi. T. 22.

De filio-familias.

NON tamen omnibus licet facere testamentum: statìm enim ii, qui alieno juri subjecti sunt, testamenti faciendi jus non habent: adeò quidem ut, quamvis parentes eis permiserint, nihilo magis jure testari possint: exceptis iis, quos antea enumeravimus, et præcipuè militibus, qui in potestate parentum sunt; quibus de eo, quod in castris acquisiverunt, permissum est, ex constitutionibus principum, testamentum facere. Quod quidem jus ab initio tantum militantibus datum est, tam ex auctoritate Divi Augusti, quam Nervæ, nec non op-

The right of making a testament is not granted to all. Persons under the power of others, have not this right: so that, although parents have given permission, this will not enable their children to make a valid testament; those excepted whom we have already mentioned, and principally sons of families engaged in the army, who by our constitutions may bequeath whatever they have acquired by military service. This permission was at first granted by Augustus, Nerva, *and that excellent prince* Trajan, *to actual soldiers only; but afterwards it was*

timi imperatoris Trajani: postea verò subscriptione Divi Hadriani etiam dimissis à militiâ, id est, veteranis, concessum est. Itaque, siquidem fecerint de castrensi peculio testamentum, pertinebit hoc ad eum, quem hæredem reliquerunt: si verò intestati decesserint nullis liberis vel fratribus superstitibus, ad parentes eorum, jure communi pertinebit. Ex hoc intelligere possumus, quod in castris acquisierit miles, qui in potestate patris est, neque ipsum patrem adimere posse, neque patris creditores id vendere, vel alitèr inquietare, neque patre mortuo cum fratribus commune esse; sed scilicèt proprium esse ejus, qui id in castris acquisierit: quanquàm jure civili omnium, qui in potestate parentum sunt, peculia, perindè in bonis parentum computentur, ac servorum peculia in bonis dominorum numerantur: exceptis videlicèt iis, quæ ex sacris constitutionibus, et præcipuè nostris, propter diversas causas non acquiruntur. Prætèr hos igitur, qui castrense peculium vel quasi castrense habent, si quis alius filiusfamilias testamentum fecerit, inutile est; licet suæ potestatis factus decesserit.

extended by the emperor Adrian *to veterans, that is, to soldiers who had received their dismission: and therefore, if the son of a family bequeath his* castrensian *or military estate, it will pass to his instituted heir: but, if such son die intestate without children or brothers, his estate will then pass of common right to his father, (or other paternal ascendants.) We may hence infer, that whatever a soldier, although under power, hath acquired by military service, can not be taken from him even by his father; whose creditors cannot sell it, or otherwise disturb the son in his possession; and what is thus acquired is not liable to be shared in common with brothers, upon the demise of the father, but remains the sole property of him, who acquired it; although by the civil law, the* peculia, *or estates of those, who are under power, are reckoned among the wealth of their parents; in the same manner as the* peculium *of a slave is esteemed the property of his master. But those estates must be excepted, which by the constitutions of the emperors, and chiefly by our own, are prohibited for divers reasons to be acquired for parents. Upon the whole, if the son of a family, neither possessed of a military or* quasi-*military estate, make a testament, it will not be valid, even though he be afterwards emancipated, and* sui juris *before his death.*

De impubere et furioso.

§ I. Præterea testamentum facere non possunt impuberes; quia nullum eorum animi judicium est. Item furiosi; quia mente carent. Nec ad rem pertinet, si impubes postea pubes, aut furiosus postea compos mentis factus fuerit, et decesserit. Furiosi autem, si per id tempus fecerint testamentum, quo furor eorum intermissus est, jure testati esse videntur; certè eo, quod ante furorem fecerint, testamento valente: nam neque testamentum rectè factum, neque ullum aliud negotium rectè gestum, posteà furor interveniens perimit.

§ 1. *A person, within the age of puberty, cannot make a good testament; because he is not supposed to possess the requisite judgment of mind; so of a madman, inasmuch as he is deprived of his senses. Nor is it material though the minor arrive at puberty before his death; or the madman regain his senses, and then die. But, if he make his will during a lucid interval, he is a legal testator; for it is certain that a testament, which a man hath made before he was seized with madness, is good: for a subsequent fit of phrenzy can neither invalidate a regular testament, or any other regular transaction.*

De prodigo.

§ II. Item prodigus, cui bonorum suorum administratio interdicta est, testamentum facere non potest: sed id, quod antè fecerit, quam interdictio bonorum suorum ei fiat, ratum est.

§ 2. *A prodigal also, who is interdicted from the management of his own affairs, can not make a testament: but if it were made before such interdiction, it is valid.*

De surdo et muto.

§ III. Item surdus et mutus non semper testamentum facere possunt. Utique autem de eo surdo loquimur, qui omninò non exaudit, non qui tardè exaudit. Nam et mutus is intelligitur, qui eloqui nihil potest, non qui tardè loquitur. Sæpè enim etiam, literati homines variis casibus et audiendi et loquendi facultatem amittunt. Undè nostra constitutio etiam his subvenit, ut, certis casibus et modis, secun-

§ 3. *A man deaf and dumb is not always capable of making a testament: but this must be understood of one, who is so deaf as to be unable to hear at all, and not of a mere thickness of hearing; and of that dumbness which prevents all utterance, and not of a mere difficulty of speech: for it often happens, that men of learning lose the faculty of hearing and speaking by various misfortunes; therefore our consti-*

dùm normam ejus possint testari, aliaque facere, quæ eis permissa sunt. Sed, si quis post testamentum factum, adversâ valetudine aut quolibet alio casu mutus aut surdus esse cœperit, ratum nihilominùs manet ejus testamentum.

tution comes in aid of all such persons, and permits them, in certain cases, to make testaments, and do many other acts, observing the rules therein laid down. But, if any man after making his testament, become deaf or mute by reason of ill health or any other accident, his testament will remain good notwithstanding.

De cæco.

§ IV. Cæcus autem non potest facere testamentum, nisi per observationem, quam lex Divi Justini patris nostri introduxit.

§ 4. *A blind man cannot make a will, unless observing the rules which the law of the emperor* Justin, *our father, has introduced.*

De eo, qui est apud hostes.

§ V. Ejus, qui apud hostes est, testamentum, quod ibi fecit, non valet, quamvis redierit: sed quod, dum in civitate fuerat, fecit, sive redierit, valet, jure postliminii; sivè illic decesserit, valet ex lege Cornelia.

§ 5. *The testament of a captive is not valid, if made during his captivity; even although he live to return. But if made while in the city, it is good; either by the* jus postliminii, *if the prisoner return; or by the law* Cornelia, *if he die captive.*

TITULUS DECIMUS-TERTIUS.

DE EXHÆREDATIONE LIBERORUM.

D. xxviii. T. 2. C. vi. T. 28, 29. Nov. 115.

Jus vetus de liberis in potestate.

NON tamen, ut omninò valeat testamentum, sufficit hæc observatio, quam supra exposuimus: sed, qui filium in potestate habet, curare debet, ut eum hæredem insti-

The solemnities of law, before explained, are not alone sufficient to make a testament valid. For he, who has a son under his power, should take care either to institute

tuat, vel exhæredem eum nominatim faciat. Alioqui, si eum silentio præterierit, inutilitèr testabitur: adeò quidem ut, si vivo patre filius mortuus sit, nemo hæres ex eo testamento existere possit: quia scilicèt ab initio non constiterit testamentum. Sed non ita de filiabus, et aliis per virilem sexum descendentibus liberis utriusque sexus, antiquitati fuerat observatum: sed, si non fuerant scripti hæredes scriptæve, vel exhæredati exhæredatæve, testamentum quidem non infirmabatur, jus tamen accrescendi eis ad certam portionem præstabatur. Sed nec nominatim eas personas exhæredare parentibus necesse erat, sed licebat inter cæteros hoc facere. Nominatim autem quis exhæredari videtur, sivè ita exhæredetur, *Titius filius meus exhæres esto*, sive ita, *filius meus exhæres esto*, non adjecto proprio nomine; scilicèt, si alius filius non extet.

him his heir, or to disinherit him by name: for, if he pass over his son in silence, the testament will have no effect. And even if the son die living the father, yet no one can take upon himself the heirship by virtue of such a testament, inasmuch as it was null from the beginning. But the ancients did not observe this rule in regard to daughters and grandchildren of either sex, though descended from the male line; for although these were neither instituted heirs, or disinherited, yet the testament was not invalidated; because a right of accretion intitled them to a certain portion of the inheritance: parents were therefore not necessitated to disinherit these children nominally, but might do it inter cæteros. *A child is nominally disinherited, if the words of the will are* let Titius my son be disinherited; *or even thus;* let my son be disinherited, *without the addition of a proper name, provided the testator had no other son living.*

De posthumis.

§ I. Posthumi quoque liberi vel hæredes instituti debent vel exhæredari: et in eo par omnium conditio est; quod et filio posthumo, et quolibet ex cæteris liberis, sive feminini sexus sive masculini, præterito, valet quidem testamentum, sed postea, agnatione posthumi sive posthumæ, rumpitur, et eâ ratione totum infirmatur. Ideòque, si mulier, ex quâ posthumus aut posthuma sperabatur, abortum fecerit, nihil impedimento est scriptis hæ-

§ 1. *Also posthumous children should either be instituted heirs, or disinherited: and in this the condition of all children is equal: but, if a posthumous son, or any posthumous descendant in the right line, male or female, be pretermitted, the testament will nevertheless be valid at the time of making it; but, by the subsequent birth of a child of either sex, it will be annulled. And therefore, if a woman from whom a posthumous child is expected, should miscarry,*

redibus ad hæreditatem adeundam. Sed fœminini quidem sexûs personæ vel nominatim vel inter cæteros exhæredari solebant: dùm tamèn, si inter cæteros exhæredarentur, aliquid eis legaretur, nè viderentur præteritæ esse per oblivionem. Masculos verò posthumos, id est, filios et deinceps, placuit non alitèr rectè exhæredari, nisi nominatim exhæredarentur, hoc scilicèt modo, *quicunque mihi filius genitus fuerit, exhæres esto.*

nothing can prevent the written heirs from entering upon the inheritance. But posthumous females may be either nominally disinherited, or inter cæteros *by a general clause: yet, if disinherited* inter cæteros, *something must be left them to show they were not omitted through forgetfulness. But male posthumous children,* i. e. *sons, and their descendants in the direct line, cannot be disinherited otherwise, than nominally in this form;* whatever son is hereafter born to me, I disinherit him.

De quasi posthumis.

§ II. Posthumorum autem loco sunt et hi, qui in sui hæredis locum succedendo, *quasi agnascendo*, fiunt parentibus sui hæredes: ut eccè, si quis filium, et ex eo nepotem neptemve, in potestate habeat, quia filius gradu præcedit, is solus jura sui hæredis habet; quamvis nepos quoque et neptis ex eo in eadem potestate sint. Sed, si filius ejus vivo eo moriatur, aut quálibet aliâ ratione exeat de potestase ejus, incipit nepos neptisve in ejus locum succedere, et eo modo jura suorum hæredum quasi agnatione nanciscitur. Ne ergò eo modo rumpatur ejus testamentum, sicùt ipsum filium vel hæredem instituere vel nominatim exhæredare debet, ne non jure faciat testamentum; ita et nepotem neptemve ex filio necesse est ei vel hæredem instituere vel exhæredare; ne fortè eo vivo, filio mortuo, succedendo in locum ejus nepos, neptisve, quasi agnascendo, rumpat tes-

§ 2. *Those are reckoned in the place of posthumous children, who, succeeding in the stead of proper heirs, become, by* agnation, *or* quasi-*birth, proper heirs to their parents: thus, if* Titius *have a son under his power, and by him a grand-son, or grand-daughter, then would the son, because he is first in degree, have the sole right of a proper heir, although the grand-son, or grand-daughter by that son, is under the same parental power. But, if the son of* Titius *should die in his father's lifetime, or should by any other means cease to be under his father's power, the grand-son or grand-daughter would succeed in his place; and would thus, by what may be called a* quasi-*birth, obtain the right of a proper heir. Therefore, as it behoves a testator for his own security, either to institute or disinherit his son, lest his testament should be annulled, so it is equally necessary for him either to*

tamentum. Idque lege Julia Velleia provisum est: in qua similis exhæredationis modus ad similitudinem posthumorum demonstratur.

institute or disinherit his grand-son or grand-daughter by that son, lest, if his son should die in his (the testator's) life-time, his grand-son or grand-daughter, succeeding to the place of his son, should make void his testament by quasi agnation. This has been introduced by the law Julia Velleia, *in which is set forth a form of disinheriting* quasi-*posthumous, like that of posthumous children.*

De emancipatis.

§ III. Emancipatos liberos jure civili neque hæredes instituere, neque exhæredare, necesse est: quia non sunt sui hæredes. Sed prætor omnes, tam fœminini sexûs quam masculini, si hæredes non instituantur, exhæredari jubet; virilis sexus nominatim, fœminini vero inter cæteros: quia, si neque hæredes instituti fuerunt, neque ita (ut diximus) exhæredati, promittit eis prætor contra tabulas testamenti, bonorum possessionem.

§ 3. *The* civil law *does not make it necessary, either to institute emancipated children heirs, or to disinherit them in a testament; inasmuch as they are not* sui hæredes, *i. e. proper heirs. But the prætor ordains, that all children male or female, if they be not instituted heirs, shall be disinherited; the males nominally; the females* inter cæteros: *for, if children have neither been instituted heirs, nor properly disinherited in manner before mentioned, the prætor gives them possession of the goods, contrary to the testament.*

De adoptivis.

§ IV. Adoptivi liberi, quamdiù sunt in potestate patris adoptivi, ejusdem juris habentur, cujus sunt justis nuptiis quæsiti: itaque hæredes instituendi vel exhæredandi sunt, secundùm ea, quæ de naturalibus exposuimus. Emancipati verò à patre adoptivo, neque jure civili, neque eo jure, quod ad edictum prætoris attinet, inter liberos connumerantur. Quâ ratione acci-

§ 4. *Adopted children, while under the power of their adoptive father, are intitled to the rights of children born in lawful matrimony: and therefore they must either be instituted heirs, or disinherited, according to the rules laid down respecting natural (legitimate) children. But neither by the civil law, or by prætorian equity, are children emancipated by an adoptive father, numbered*

dit, ut ex diverso, quod ad naturalem parentem attinet, quamdiù quidem sunt in adoptivâ familiâ, extraneorum numero habeantur, ut eos neque hæredes instituere, neque exhæredare, necesse sit: cum verò emancipati fuerint ab adoptivo patre, tunc incipiant in eâ causâ esse, in quâ futuri essent, si à naturali patre emancipati fuissent.

among his natural or legitimate children, so as to partake of their rights: hence adopted children, while in adoption, are reputed strangers to their natural parents, who need not institute them heirs, or disinherit them: but, when emancipated by their adoptive father, they are in the same state, in which they would have been, if emancipated by their natural father.

Jus novum.

§ V. Sed hæc quidem vetustas introducebat. Nostra vero constitutio, inter masculos et fœminas in hoc jure nihil interesse existimans, quia utraque persona in hominum procreatione simili naturæ officio fungitur, et lege antiquâ duodecim tabularum omnes similitèr ad successionem ab intestato vocabantur, quod et prætores postea secuti esse videntur, ideò simplex ac similę jus, et in filiis et in filiabus et in cæteris descendentibus per virilem sexum personis, non solùm jam natis, sed etiam posthumis, introduxit; ut omnes, sivè sui sivè emancipati sint, vel hæredes instituantur, vel nominatim exhæredentur: et eundem habeant effectum circa testamenta parentum suorum infirmanda, et hæreditatem auferendam, quem filii sui vel emancipati habent, sivè jam nati sint, sivè, adhuc in utero constituti, postea nati sint. Circa adoptivos autem filios certum induximus divisionem, quæ in nostrâ constitutione, quam super adoptivis tulimus, continetur.

§ 5. These were the rules of old times. But we (not thinking, that any distinction can reasonably be made between the two sexes, inasmuch as they equally contribute to the procreation of the species, and because, by the ancient law of the twelve tables, all children, were equally called to the succession ab intestato, *which law the prætors seem afterwards to have followed) have by our constitution introduced the same law both as to sons and daughters, and also to all other descendants in the male line, whether in being, or posthumous: so that all children whether they are proper heirs or emancipated, must either be instituted heirs or disinherited by name: and they possess the same influence as to avoiding the testament of the parent, and destroying the heirship, as the legitimate or emancipated children have, whether appointed as living or as posthumous children. In respect of adopted children, we have introduced certain regulations, which are contained in our constitution of adoptions.*

De testamento militis.

§ VI. Sed, si in expeditione occupatus miles testamentum faciat, et liberos suos jam natos vel posthumos nominatim non exhæredaverit, sed silentio præterierit, non ignorans, an habeat liberos, silentium ejus pro exhæredatione nominatim facta valere, constitutionibus principum cautum est.

§ 6. *If a soldier in actual service make his testament, and neither disinherit his children already born, or his posthumous children by name, but pass them over in silence, although it be known to him, that he has such children, it is provided by the constitutions of the emperors, that such silence shall be equal to a nominal disinherison.*

De testamento matris, aut avi materni.

§ VII. Mater vel avus maternus necesse non habent liberos suos aut hæredes instituere, aut exhæredare, sed possunt eos silentio omittere: nam silentium matris aut avi materni, et cæterorum per matrem ascendentium, tantum facit, quantum exhæredatio patris. Nèque enim matri filium filiamve, neque avo materno nepotem neptemve ex filia, si eum eamve hæredem non instituat, exheredare necesse est, sivè de jure civili quæramus, sivè de edicto prætoris, quo prætor præteritis liberis contra tabulas bonorum possessionem promittit: sed aliud eis adminiculum servatur, quod paulò post vobis manifestum fiet.

§ 7. *Neither a mother, nor a grandfather on the mother's side, need expressly institute their children heirs, or disinherit them, but may pass them by in silence; for the silence of a mother, a maternal grandfather, and of all other ascendants on the mother's side, is equivalent to an actual disinherison by a father. For a mother is not obliged to disinherit her children, if she does not think proper to institute them her heirs: neither is a maternal grandfather under a necessity of instituting or of disinheriting his grandson or granddaughter by a daughter; inasmuch as this is not required either by the civil law, or the* edict *of the prætor, which gives possession of goods contrary to the testament, to those children, who have been passed over in silence. But children, in this case, are not without remedy against the testament of their mother or maternal grandfather, which shall be shewn hereafter.*

TITULUS DECIMUS-QUARTUS.

DE HÆREDIBUS INSTITUENDIS.

D. xxviii. T. 5. C. vi. T. 24.

Qui possunt hæredes instituí.

HÆREDES instituere permissum est tam liberos homines quam servos; et tam proprios, quam alienos. Proprios autem olim quidem secundùm plurium sententias non alitèr, quam cum libertate, rectè instituere licebat: hodiè verò etiam sinè libertate ex nostrâ constitutione eos hæredes instituere permissum est. Quod non per innovatiònem induximus, sed quoniam æquius erat, et Atilicino placuisse, Paulus suis libris, quos tam ad Masurium Sabinum quam ad Plautium scripsit, refert. Proprius autem servus etiam is intelligitur, in quo nudam proprietatem testator habet, alio usumfructum habente. Est tamen casus, in quo nec cum libertate utilitèr servus à domino hæres instituitur, ut constitutione Divorum Severi et Antonini cavetur, cujus verba hæc sunt. *Servum, adulterio maculatum, non jure testamento manumissum ante sententiam ab ea muliere videri, quæ rea fuerat ejusdem criminis postulata, rationis est. Quare sequitur, ut, in eundem à domina collata, hæredis institutio nullius momenti habeatur.* Alienus servus etiam is intelligitur, in quo usumfructum testator habet.

A man may appoint slaves, as well as freemen, to be his heirs by testament; and may nominate the slaves of another as well as his own: yet, according to the opinion of many, no master could formerly make his own slaves his heirs, without freeing them: but, at present, by our constitution, masters may do this: which we have introduced, not for the sake of innovation, but because it seemed most just; and because Paulus, *in his commentaries upon* Sabinus *and* Plautius, *affirms, that this was also the opinion of* Atilicinus. *We call a slave* proprius servus, *if the testator had only a naked property in him, the usufruct being in another. But, in a constitution of the emperors* Severus *and* Antoninus, *there is a case, in which a slave was not permitted to be instituted heir by his owner, although his liberty was expressly given to him. The words are*——It is consonant to right reason, that no slave, accused of adultery with his mistress, shall be allowed, before a sentence of acquital, to be made free by that mistress, who is alleged to be a partner in the crime. *Hence if a mistress institute such a slave to be her heir, it is of no avail.* Alienus servus *is one of whom the testator had only the usufruct.*

Si servus hæres institutus in eâdem causâ manserit, vel non.

§ I. Servus autem à domino suo hæres institutus, siquidem in eadem causâ manserit, fit ex testamento liber, hæresque ei necessarius. Si verò à vivo testatore manumissus fuerit, suo arbitrio adire hæreditatem potest; quia non fit hæres necessarius, cum utrumque ex domini testamento non consequatur. Quod si alienatus fuerit, jussu novi domini adire hæreditatem debet, et eâ ratione per eum dominus fit hæres: nam ipse alienatus neque liber, neque hæres, esse potest; etiamsi cum libertate hæres institutus fuerit: destitisse enim à libertatis datione videtur dominus, qui eum alienavit. Alienus quoque servus hæres institutus, si in eâdem causa duraverit, jussu ejus domini adire hæreditatem debet. Si verò alienatus fuerit ab eo, aut vivo testatore, aut post mortem ejus, antequam adeat, debet jussu novi domini adire. At, si manumissus est vivo testatore, vel mortuo, antequam adeat, suo arbitrio adire potest hæreditatem.

§ 1. *A slave instituted by his master, remaining in slavery becomes free at the death of his master, by virtue of the testament, and his necessary heir. But, if he be manumitted in the lifetime of his master, he may accept or refuse the inheritance; for he does not become a necessary heir, since he does not obtain both his liberty and the inheritance, by virtue of the testament. But, if he should be aliened, he can not enter upon the inheritance unless at the command of his new master, who through his slave may become the heir of the testator. For a slave aliened, can not obtain his liberty, or take an inheritance to his own use, by virtue of the testament of the master, who transferred him, although his freedom was expressly given by such testament; because a master, who has aliened his slave, seems to have renounced the intention of enfranchising him. And, when the slave of another is appointed heir, but remains in slavery, he can not take the inheritance, but by his master's order: and, if the slave be aliened in the lifetime of the testator, or even after his death, before he has actually taken the inheritance, he must accept or refuse it, at the command of his new master. But, if the slave be infranchised, living the testator, or after his death, before he has accepted the heirship, he may enter upon the inheritance or not, at his own option.*

De servo hæreditario.

§ II. Servus etiam alienus post domini mortem rectè hæres instituitur: quia et cum hæreditariis servis testamenti factio est. Nondum enim adita hæreditas, personæ vicem sustinet non hæredis futuri, sed defuncti: cum etiam ejus, qui in utero est, servus rectè hæres instituatur.

§ 2. *The slave of another may legally be instituted an heir, after the death of his master; for slaves of an inheritance not entered upon, may take by testament: for an inheritance, not yet entered on, represents the person of the deceased, and not of the future heir: thus the slave even of a child in the womb, may be constituted an heir.*

De servo plurium.

§ III. Servus autem plurium, cum quibus testamenti factio est, ab extraneo institutus hæres, unicuique dominorum, cujus jussu adierit, pro portione dominii acquirit hæreditatem.

§ 3. *If the slave of many masters, all capable of taking by testament, is instituted heir by a stranger, he acquires a part of the inheritance for each master, who commanded him to take it, according to the several proportions of property.*

De numero hæredum.

§ IV. Et unum hominem, et plures, usque in infinitum, quot quis hæredes velit, facere licet.

§ 4. *A testator may appoint one heir, or as many heirs as he pleases* in infinitum.

De divisione hæreditatis.

§ V. Hæreditas plerumque dividitur in duodecim uncias; quæ assis appellatione continentur. Habent autem et hæ partes propria nomina ab uncia usque ad assem; ut puta hæc, sextans, quadrans, triens, quincunx, semis, septunx, bes, dodrans, dextans, deunx. Non autem utique semper duodecim uncias esse oportet: nam tot unciæ assem efficiunt, quot testator voluerit: et, si unum tantum quis ex semisse (verbi gratiâ) hæredem scripserit,

§ 5. *An inheritance is generally divided into twelve* unciæ, *that is, parts or ounces, all which are comprehended under one total, termed an* As: *and each of these parts, from the* uncia *to the* As, *has its peculiar name; viz.*

Sextans—*a sixth part, or 2 ounces.*
Quadrans—*a fourth, or 3 ounces.*
Triens—*a third, or 4 ounces.*
Quincunx—*five ounces.*
Semis—*a moiety, or 6 ounces.*
Septunx—*seven ounces.*

totus as in semisse erit; neque enim idem ex parte testatus, et ex parte intestatus, decedere potest, nisi sit miles, cujus sola voluntas in testando spectatur. Et è contrario potest quis in quantascunque voluerit, plurimas uncias suam hæreditatem dividere.

Bes—*two thirds, or 8 ounces;* quasi, bis triens.

Dodrans—*nine ounces, or three fourths;* quasi, dempto quadrante, As.

Dextans—*ten ounces;* quasi, dempto sextante, As.

Deunx—*eleven ounces out of twelve;* quasi, demptâ unciâ, As.

But it is not necessary, that an As, *or* total, *should always be divided into twelve parts; for an* As *may consist of what parts the testator pleases; and, if a man name but one heir, and appoint him* ex semisse, i. e. *the heir of six parts; yet the whole* As *will be included; for no man can die partly testate and partly intestate, except a soldier, whose intention is solely to be regarded. And a testator may also divide his estate into as many parts, as he thinks convenient.*

De portionibus singulorum hæredum. Si testator assem non diviserit, aut partes in quorundam personâ non ultra assem expresserit.

§ VI. Si plures instituantur hæredes, ita demùm in hoc casu partium distributio necessaria est, si nolit testator, eos ex æquis partibus hæredes esse. Satis enim constat, nullis partibus nominatis, ex æquis partibus eos hæredes esse. Partibus autem in quorundam personis expressis, si quis alius sinè parte nominatus erit, siquidem aliqua pars assi deerit, ex eâ parte hæres fit. Et, si plures sinè parte scripti sunt, omnes in eandem partem concurrunt. Si verò totus As completus sit, ii, qui nominatim expressas

§ 6. *If many heirs be appointed, it is necessary to make a division of the effects, if it be not intended, that all should take in equal portions; which must be the case if no distribution be made. But if the shares of some should be expressed, and a share or shares remain undisposed of, such share or shares will belong equally to him or them whose shares are not specified. But, if a whole* As, *or inheritance, be given among some of the nominated heirs, yet they, whose shares are mentioned, are entitled only to a moiety; and he*

partes habent, in dimidiam partem vocantur; et ille, vel illi omnes, in alteram dimidiam. Nec interest, primus an medius, an novissimus, sinè parte hæres scriptus sit: ea enim pars data intelligitur, quæ vacat.

or they, whose shares are not mentioned, are called to the succession of the other moiety. And, when a whole inheritance is not given, it is immaterial whether an heir, whose share is not specified, hold the first, middle, or last place in the nomination: for he is equally intitled to the part not bequeathed.

Si pars vacet, aut exuperet.

§ VII. Videamus, si pars aliqua vacet, nec tamen quisquam sinè parte fit hæres institutus, quid juris sit, veluti si tres ex quartis partibus hæredes scripti sunt. Et constat, vacantem partem singulis tacitè pro hæreditariâ parte accedere, et perindè haberi, ac si ex tertiis partibus hæredes scripti essent: et ex diverso, si plures hæredes scripti in portionibus sint, tacitè singulis decrescere; ut, si (verbi gratiâ) quatuor ex tertiis partibus hæredes scripti sint, perindè habeatur, ac si unusquisque ex quartâ parte hæres scriptus fuisset.

§ 7. *Let us inquire in case a part should remain unbequeathed, and yet a certain portion should be given to each nominated heir: as if three should be instituted, and a fourth given to each. It is clear in this case that the undisposed part would vest in each, in proportion to his share bequeathed; and that each would be reputed the written heir of a third. And, on the contrary, if many are nominated heirs in certain portions, so as to exceed the* As, *then each heir must suffer a defalcation* pro ratâ——*for example, if four are instituted, and a third be given to each, then this disposition would be the same as if each of the written heirs had been instituted to a fourth only.*

Si plures unciæ quam duodecim distributæ sunt.

§ VIII. Et, si plures unciæ, quam duodecim, distributæ sint, is, qui sinè parte institutus est, quod dupondio deest, habebit. Indemque erit, si dupondius expletus sit. Quæ omnes partes ad assem postèa

§ 8. *If more than twelve ounces, are bequeathed, then he, who is instituted without any prescribed share, shall be intitled to what remains of a* dupondius; *that is, of twenty-four parts: and, if more than*

revocantur, quamvis sint pluritum unciarum.

twenty-four parts are bequeathed, then the heir, who is nominated without any determinate share, is intitled to the remainder of a tripondius, i. e. *of thirty-six parts or ounces. But all these parts are afterwards reduced to twelve.*

De modis instituendi.

§ IX. Hæres et purè et sub conditione institui potest; ex certo tempore, aut ad certum tempus, non potest: veluti, *post quinquennium, quam moriar;* vel *ex calendis illis:* vel, *usque ad calendas illas hæres esto.* Denique diem adjectum haberi pro supervacuo placet, et perindè esse, ac si purè hæres institutus esset.

§ 9. *An heir may be constituted simply, or conditionally—but not* from *or* to *any certain period: as,* be my heir after five years *to be computed* from my death—*or*—from the calends of such a month ——*or*——until the calends of such a month. *For time, thus added, is in law deemed void, and the appointment becomes unconditional.*

De conditione impossibili.

§ X. Impossibilis conditio in institutionibus et legatis, nec non in fideicommissis et libertatibus, pro non scriptâ habetur.

§ 10. *An impossible condition in the institution of heirs, legatees, or trustees, or the conferring of liberty, is treated as unwritten or void.*

De pluribus conditionibus.

§ XI. Si plures conditiones in institutionibus adscriptæ sunt, siquidem conjunctim, ut puta, *si illud et illud factum fuerit,* omnibus parendum est: si separatim, veluti, *si illud aut illud factum erit,* cui libet conditioni obtemperare satis est.

§ 11. *If many conditions be jointly required in the appointment,* as if this *and* that thing be done, *then both must be complied with. But, if the conditions be placed in the disjunctive,* as, if this, *or* that be done, *it will then be sufficient to obey either.*

De his, quos nunquam testator vidit.

§ XII. Ii, quos nunquam testator vidit, hæredes institui possunt, veluti si fratris filios peregrinantes, ignorans qui essent, hæredes insti-

§ 12. *A testator may appoint persons his heirs, whom he hath never seen; as his brother's sons, in a foreign country, although he knows*

tuerit : ignorantia enim testantis, inutilem institutionem non facit.

not where they are; for the want of this knowledge will not vitiate the institution.

TITULUS DECIMUS-QUINTUS.

DE VULGARI SUBSTITUTIONE.

D. xxviii. T. 6. C. vi. T. 25 et 26.

De pluribus gradibus hæredum.

POTEST autem quis in testamento suo plures gradus hæredum facere; ut puta *si ille hæres non erit, ille hæres esto.* Et deinceps, in quantum velit, testator substituere potest: ut novissimo loco, in subsidium, vel servum, necessarium hæredem instituere possit.

A man by testament may appoint many degrees of heirs; as thus: if *Titius* will not, let *Seius* be my heir. *And he may proceed in such a substitution as far as he shall think proper; and lastly, in default of all others, he may constitute a slave his necessary heir.*

De numero hæredum in singulis gradibus.

§ I. Et plures in unius locum possunt substituti, vel unus in plurium, vel singuli in singulorum, vel invicèm ipsi, qui hæredes instituti sunt.

§ 1. *A testator may substitute many in the place of one, or one in the place of many, or one in the place of each, or he may substitute even his instituted heirs reciprocally to one another.*

Quam partem singuli substituti accipiant, si partes in substitutione expressæ non sint.

§ II. Et, si ex disparibus partibus hæredes scriptos invicèm substituerit, et nullam mentionem partium in substitutione habuerit, eas videtur in substitutione partes dedisse, quas in institutione expres-

§ 2. *If a testator, having instituted several co-heirs in unequal portions, substitute them reciprocally the one to the other, and make no mention of their shares of the inheritance in the substitution, he seems*

sit : et ita Divus Pius rescripsit.

to have given the same shares by the substitution, which he gave by the institution; and thus the emperor Antoninus *ordained.*

Si cohæredi substituto alius substituatur.

§ III. Sed, si instituto hæredi, cohærede substituto dato, alius ei substitutus fuerit, Divi Severus et Antoninus sinè distinctione rescripserunt, ad utramque partem substitutum admitti.

§ 3. *If a co-heir be substituted to an instituted heir, and a third person to that co-heir, the emperors,* Severus *and* Antoninus, *have by rescript ordained, that such substituted person, shall be admitted to the portions of both the co-heirs without distinction.*

Si quis servo, qui liber existimabatur, instituto substitutus fuerit.

§ IV. Si servum alienum quis, patrem-familias arbitratus, hæredem scripserit, et, si hæres non esset, Mævium ei substituerit; isque servus jussu domini adierit hæreditatem, Mævius substitutus in partem admittitur. Illa enim verba, *si hæres non erit*, in eo quidem, quem alieno juri subjectum esse testator scit, sic accipiuntur, *si neque ipse hæres erit, neque alium hæredem effecerit:* in eo verò, quem patrem-familias arbitratur, illud significant, *si hæreditatem sibi, vel ei, cujus juri postea subjectus esse cœperit, non acquisierit.* Idque Tiberius Cæsar in personâ Parthenii servi sui constituit.

§ 4. *If a testator constitute the slave of another his heir, supposing him free, and add,* if he does not become my heir, I substitute *Mævius* in his place; *then, if that* slave *should afterwards enter upon the inheritance at the command of his master,* Mævius *the substitute, would be admitted to a moiety. For the words,* if he do not become my heir, *in regard to him, whom the testator knew to be under the dominion of another, are taken to mean,* if he will neither become my heir himself, nor cause another to be my heir: *but in regard to him, whom the testator supposed to be free, they imply this condition; viz.* if my heir will neither acquire the inheritance for himself, nor for him to whose dominion he may afterwards become subject. *But it was determined by* Tiberius, *the emperor, in the case of his own slave* Parthenius, *that a substitute in such a case should be admitted to a moiety.*

Quibus substituitur.

§ IV. Non solùm tamen hæredibus institutis impuberibus liberis ita substituere parentes possunt, ut, si hæredes eis extiterint, et ante pubertatem mortui fuerint, sit eis hæres is, quem ipsi voluerint; sed etiam exhæredatis. Itaque eo casu, si quid exhæredato pupillo ex hæreditatibus, legatisve, aut donationibus propinquorum atque amicorum, acquisitum fuerit, id omne ad substitutum pertinebit. Quæcunque diximus de substitutione impuberum liberorum, vel hæredum institutorum, vel exhæredatorum, eadem etiam de posthumis intelligimus.

§ 4. *Parents may not only substitute to their children within puberty, if such children become their heirs, and die within puberty; but they may substitute to their disinherited children; and therefore, whatever a disinherited child, within the age of puberty, may have acquired by inheritances, by legacies, or by the gift of relations and friends, the whole will become the property of the substitute. All we have said concerning the substitution of pupils, instituted heirs, or disinherited children, is understood to extend also to posthumous children.*

Pupillare testamentum sequela paterni.

§ V. Liberis autem suis testamentum nemo facere potest, nisi et sibi faciat; nam pupillare testamentum pars et sequela est paterni testamenti: adeò ut, si patris testamentum non valeat, nec filii quidem valebit.

§ 5. *No parent can make a testament for his children, unless he hath made a testament for himself: for the pupillary testament is a part and consequence of the testament of the parent, insomuch that, if the testament of the father be not valid, neither will that of the son.*

Quot liberis substituitur.

§ VI. Vel singulis autem liberis, vel ei, qui eorum novissimus impubes morietur, substitui potest. Singulis quidem, si neminem eorum intestatum decedere voluerit: novissimo, si jus legitimarum hæreditatum integrum inter eos custodiri velit.

§ 6. *A parent may make a pupillary substitution to each of his children, or to him, who shall die the last within puberty. To each, if he be unwilling, that any of them should die intestate; to the last who shall die within puberty, if he wish that they should preserve among them the intire right of succession.*

De substitutione nominatim aut generalitèr factâ.

§ VII. Substituitur autem impuberi aut nominatim, veluti, Titius *hæres esto:* aut generalitèr, ut, *Quisquis mihi hæres erit.* Quibus verbis vocantur ex substitutione, impubere mortuo filio, illi, qui et scripti sunt hæredes, et extiterunt, et pro quâ parte hæredes facti sunt.

§ 7. *A substitution may be made to a child within puberty, by name, as,* let TITIUS be heir; *or generally*—Whoever shall be my heir, let him be substitute to my son, if he die within puberty. *By these words, all, who have been instituted, and acted as heirs to the father, are called, by substitution, to the inheritance of the son, if he should die within puberty, in proportion to the share assigned to each in the father's will.*

Quomodo substitutio pupillaris finitur.

§ VIII. Masculo igitur usque ad quatuordecim annos substitui potest: fœminæ usque ad duodecim annos. Et, si hoc tempus excesserint, substitutio evanescit.

§ 8. *A pupillary substitution may be made to males, until they reach fourteen; and to females, until they have completed their twelfth year: after which the substitution becomes extinct.*

Quibus pupillaritèr non substituitur.

§ IX. Extraneo verò vel filio puberi hæredi instituto ita substituere nemo potest, ut, si hæres extiterit, et intra aliquod tempus decesserit, alius ei sit hæres: sed hoc solùm permissum est, ut eum per fideicommissum testator obliget alii hæreditatem ejus vel totam vel pro parte restituere: quod jus quale sit, suo loco trademus.

§ 9. *A pupillary substitution cannot be made either to an instituted stranger, or instituted son, if past the age of puberty. But a testator may oblige his heir to give to another a part, or even the whole of the inheritance, by virtue of a* fidei-commissum, *or gift in trust; which we will treat of in its proper place.*

TITULUS DECIMUS-SEPTIMUS.

QUIBUS MODIS TESTAMENTA INFIRMANTUR.

D. xxviii. T. 3.

Quibus modis testamenta infirmantur.

TESTAMENTUM jure factum usque eò valet, donec rumpatur, irritumve fiat.

A testament, legally made, remains valid, until it be either broken, or rendered ineffectual.

Quando testamentum dicatur rumpi. Primum de adoptione.

§ I. Rumpitur autem testamentum, cum, in eodem statu manente testatore, ipsius testamenti jus vitiatur. Si quis enim post factum testamentum adoptaverit sibi filium per imperatorum eum, qui est sui juris, aut per prætorem, secundùm nostram constitutionem, eum, qui in potestate parentis fuerit, testamentum ejus rumpitur quasi agnatione sui hæredis.

§ 1. *A testament is broken, when the force of it is destroyed, while the testator still remains in the same state. For, if, after making his testament he should arrogate an independent person, by licence from the emperor, or, in the presence of the prætor should adopt a child under the power of his natural parent, by virtue of our constitution, then that testament would be broken by this agnation or quasi-birth of a proper heir.*

De posteriore testamento.

§ II. Posteriore quoque testamento, quod jure perfectum est, superius rumpitur; nec interest, extiterit aliquis hæres ex eo, an non; hoc enim solùm spectatur, an aliquo casu existere potuerit. Ideòque, si quis aut noluerit hæres esse, aut vivo testatore, aut post mortem ejus, antequam hæreditatem adiret, decesserit, aut conditione, sub quâ hæres institutus est, defectus sit, in his casibus pater-familias intestatus moritur. Nam et prius testamen-

§ 2. *A former testament, may be broken by a subsequent one legally made, nor is it material, whether any heir, be nominated in the latter or not; for the only question is, whether an heir might have been made: therefore, if an instituted heir should renounce, or should die, living the testator; or after his death, and before he could enter upon the inheritance; or before the condition is accomplished, upon which he was instituted; in any of these cases, the*

tum non valet, ruptum à posteriore; et posterius æque nullas vires habet, cum ex eo nemo hæres extiterit.

testator would die intestate; for the first testament would be invalid, being broken by the second, and the second would be of as little force, for want of an heir.

De posteriore, in quo hæres certæ rei institutus.

§ III. Sed, si quis, priore testamento jure perfecto, posterius æque jure fecerit, etiamsi ex certis rebus in eo hæredem instituerit, superius tamen testamentum sublatum esse, Divi Severus et Antoninus Augusti rescripserunt; cujus constitutionis verba et hic inseri jussimus, cum aliud quoque præterea in eâ constitutione expressum sit. *Imperatores Severus et Antoninus Augusti Cocceio Campano. Testamentum secundo loco factum, licet in eo certarum rerum hæres scriptus sit, perinde jure valere, ac si rerum mentio facta non esset: sed et teneri hæredem scriptum, ut contentus rebus sibi datis, aut suppleta quarta ex lege Falcidia, hæreditatem restituat his qui in priore testamento scripti fuerant, propter inserta fidei-commissi verba, quibus ut valeret prius testamentum expressum est, dubitari non oportet.* Et ruptum quidem testamentum hoc modo efficitur.

§ 3. *If a man, having duly executed one testament, should make another equally good, and institute an heir in it to some particular things only, the emperors* Severus *and* Antoninus *have by rescript declared, that, in this case, the first will shall be considered as broken. We have commanded the words of this constitution to be here inserted, as it contains a further provision. The emperors* Severus *and* Antoninus *to* Cocceius Campanus. A second testament, although the heir named in it, be instituted to particular things only, shall be as valid, as if they had not been specified; yet doubtless, the written heir must content himself either with the things given him, or with the fourth part, allowed by the *Falcidian* law, and shall be bound to restore the rest of the inheritance to the heirs instituted in the first testament, on account of words, denoting a trust, inserted in the second: by which words it is declared, that the first testament shall subsist. *And, in this manner, a testament may be said to be broken or cancelled.*

De testamentò irrito; et quibus modis fit irritum.

§ IV. Alio autem moda testamenta jure facta infirmantur; veluti cum is, qui fecit testamentum, capite diminutus sit: quod, quibus modis accidat, primo libro retulimus.

§ 4. *Testaments, legally made, are also invalidated, if the testator suffer diminution, (that is, change his condition:) in the first book (of these institutes,) we have shewn by what means diminution may happen.*

Cur dicatur irritum.

§ V. Hoc autem casu irrita fieri testamenta dicuntur; cum alioqui, et quæ rumpuntur, irrita fiant, et ea, quæ statim ab initio non jure fiunt, irrita sint. Sed et ea, quæ jure facta sunt, et postea per capitis diminutionem irrita fiunt, possumus nihilominùs rupta dicere. Sed, quia sanè commodius erat, singulas causas singulis appellationibus distingui, ideò quædam non jure facta dicuntur, quædam jure facta rumpi vel irrita fieri.

§ 5. *In case of diminution, testaments are said to become* irrita, *(ineffectual;) although those which are broken, or which, from the beginning, were not legal, are equally so. We may also consider those testaments broken, which being at first legally made, are afterwards rendered ineffectual by diminution. But, as it is proper, that every particular defect should be distinguished by a particular appellation, those testaments, which are illegal in their formation, are termed* null; *those which were at first legal, but afterwards lose their force, by some revocatory act of the testator, are said to be* rupta, *or broken; and those, since the making whereof, the testator hath suffered a change of state, are* irrita, *or ineffectual.*

Quibus modis convalescit.

§ VI. Non tamen per omnia inutilia sunt ea testamenta, quæ, ab initio jure facta, per capitis diminutionem irrita facta sunt: nam, si septem testium signis signata sunt, potest scriptus hæres, secundùm tabulas testamenti, bonorum possessionem agnoscere, si modò defunctus et civis Romanus, et suæ potes-

§ 6. *But a testament, at first legally made, and afterwards rendered ineffectual by diminution, may not be altogether void; for the written heir is intitled to the possession of the goods, under the testament, if it appear, that it was sealed by seven witnesses, and that the testator was a* Roman *citizen, and not under*

tatis, mortis tempore fuerit. Nam, si ideò irritum factum sit testamentum, quia civitatem vel etiam libertatem testator amissit, aut quia in adoptionem se dedit, et mortis tempore in adoptivi patris potestate sit, non potest scriptus hæres secundùm tabulas bonorum possessionem petere.

power, at the time of his death: but, if a testament became void, because the testator had lost the right of a citizen, or his liberty, or had given himself in adoption, and at the time of his death continued under power of his adoptive father, then the written heir could not demand possession under it.

De nudâ voluntate.

§ VII. Ex eo autem solo non potest infirmari testamentum, quod postea testator id noluerit valere: usque adeò ut, si quis, post factum prius testamentum, posterius facere cœperit, et, aut mortalitate præventus, aut quia eum ejus rei pœnituit, id non perfecerit, Divi Pertinacis oratione cautum sit, ne aliàs tabulæ priores, jure factæ, irritæ fiant, nisi sequentes jure ordinatæ et perfectæ fuerint: nam imperfectum testamentum sinè dubio nullum est.

§ 7. *A testament can not be invalidated solely, because the testator was afterwards unwilling, that it should subsist: so that, if a man, after making one testament, should begin another, and by reason of death, or change of mind, should not proceed to perfect that testament, it is provided by the oration of the emperor* Pertinax, *that the first testament shall not be revoked, unless the second is both legal and perfect; for an imperfect testament is undoubtedly null.*

Si princeps litis causâ, vel in testamento imperfecto institutus fuerit.

§ VIII. Eâdem oratione expressit, non admissurum se hæreditatem ejus, qui litis causâ principem reliquerit hæredem: neque tabulas non legitimè factas, in quibus ipse ob eam causam hæres institutus erat, probaturum; neque ex nudâ voce, hæredis nomen admissurum: neque ex ullâ scripturâ, cui juris auctoritas desit, aliquid adepturum. Secundùm hoc Divi Severus et Antoninus sæpissimè rescripserunt. *Licet enim*, inquiunt,

§ 8. *The emperor* Pertinax *hath declared by the same oration, that he would not take the inheritance of any testator, who left him his heir, because a law-suit was depending; that he would never establish a will legally deficient in form, if he was upon that account instituted the heir; that he would by no means suffer himself to be nominated heir by parol; and that he would never derive emolument from any writing not authorised by strict rules of law. The*

legibus soluti simus, attamen legibus vivimus.

emperors Severus *and* Antoninus *have also often issued rescripts to the same purpose:* "*for although,* [*say they,*] *we are not subject to the laws, yet we live in obedience to them.*"

TITULUS DECIMUS-OCTAVUS.

DE INOFFICIOSO TESTAMENTO.

D. v. T. 2. C. iii. T. 28.

Ratio hujus querelæ.

QUIA plerùmque parentes sine causa liberos suos exhæredant vel omittunt, inductum est, ut de inofficioso testamento agere possint liberi, qui queruntur, aut iniquè se exhæredatos, aut iniquè præteritos; hoc colore, quasi non sanæ mentis fuerint, cum testamentum ordinarent. Sed hoc dicitur, non quasi verè furiosus sit; sed rectè quidem testamentum fecerit, non autem ex officio pietatis. Nam, si verè furiosus sit, nullum testamentum est.

Since parents often disinherit their children without cause, or omit to mention them in their testaments, it has therefore been introduced, that children, who have been unjustly disinherited, or omitted, may complain, that such testaments are inofficious, under colour, that their parents were not of sane mind, when they made them: not that the testator was really insane, for the testament may have been well made; but that it is not consistent with the duty of a parent. For, if a testator were really insane at the time, his testament is null.

Qui de inofficioso agunt.

§ I. Non autem liberis tantùm permissum est testamentum parentum inofficiosum accusare, verùm etiam liberorum parentibus: soror autem et frater, turpibus personis scriptis hæredibus, ex sacris consti-

§ 1. *Not children only are allowed to complain, that testaments are inofficious; for parents are permitted to do the same. Also the brothers and sisters of a testator, by the imperial constitutions, are preferred to*

tutionibus prælati sunt; non ergò contra omnes hæredes agere possunt. Ultra fratres igitur et sorores, cognati nullo modo aut agere possunt, aut agentes vincere.

infamous persons, if any such have been instituted heirs; but they are not therefore allowed to complain against any *heir. Collaterals, beyond brothers and sisters, cannot sustain a complaint in this respect or succeed for themselves, (but though their right of complaining be not disputed, and the testament be annulled, yet those only can be benefited, who are the nearest in succession upon an intestacy.)*

Qui alio jure veniunt, de inofficioso non agunt.

§ II. Tam autem naturales liberi, quam secundùm nostræ constitutionis divisionem adoptati, ita demùm de inofficioso testamento agere possunt, si nullo alio jure ad defuncti bona venire possint: nam, qui ad hæreditatem totam vel partem ejus, alio jure veniunt, de inofficioso agere non possunt. Posthumi quoque, qui nullo alio jure venire possunt, de inofficioso agere possunt.

§ 2. *Adopted as well as natural children, according to our constitution, are admitted to complain against a testament as inofficious, if they can obtain the effects of the deceased no other way; but if they can obtain the whole or a part of the inheritance by any other means, they cannot pursue this remedy. Posthumous children also, who are unable to recover their inheritance by any other method, are allowed to urge this complaint.*

De eo, cui testator aliquid reliquit.

§ III. Sed hæc ita accipienda sunt, si nihil eis penitùs à testatoribus testamento relictum est: quod nostra constitutio ad verecundiam naturæ introduxit. Sin verò quantacunque pars hæreditatis, vel res, eis fuerit relicta, de inofficioso querelâ quiescente, id, quod eis deest, usque ad quartam legitimæ partis repleatur, licèt non fuerit ad-

§ 3. *All this must be understood to take place only, when nothing hath been left by the will of the deceased; and this hath been introduced by our constitution, out of respect to parental authority and the ties of nature: for, if a single thing, or the least part of an inheritance, hath been bequeathed, the suit* de inofficioso testamento *is barred: but their legal*

jectum, boni viri arbitratu debere eam compleri.

portion, or fourth part, though not added by the testator, may be completed according to the arbitration of some person of approved character.

Si tutor, cui nihil à patre relictum, pupilli nomine legatum acceperit.

§ IV. Si tutor nomine pupilli, cujus tutelam gerebat, ex testamento patris sui legatum acceperit, cum nihil erat ipsi tutori relictum à patre suo, nihilominùs poterit nomine suo de inofficioso patris testamento agere.

§ 4. *If a tutor should accept a legacy in the name of his pupil, in consequence of a bequest made in the testament of such tutor's father, who left nothing to his son; the tutor may nevertheless complain in his own name against the testament of his father, as inofficious (or contrary to parental duty.)*

Si de inofficioso nomine pupilli agens succubuerit.

§ V. Sed, si è contrario pupilli nomine, cui nihil relictum fuerat, de inofficioso egerit et superatus est ipse tutor, quod sibi in testamento eodem relictum est, non amittit.

§ 5. *On the contrary, if a tutor should complain in the name of his pupil, against the testament of his pupil's father, who left nothing to his son as inofficious, and this testament should be confirmed, yet the tutor would not be barred, on account of this proceeding* virtute officii, *from claiming his own legacy under the same testament.*

De quartâ legitimæ partis.

§ VI. Igitur quartam quis debet habere, ut de inofficioso agere non possit, sive jure hæreditario, sive jure legati vel fidei-commissi, vel si mortis causâ ei quarta donata fuerit, vel inter vivos in iis tantummodo casibus, quorum mentionem nostra facit constitutio, vel aliis modis, qui in nostris constitutionibus continentur. Quod autem de quartâ diximus, ita intelligen-

§ 6. *No person, entitled to a fourth can be barred from bringing a complaint (de inofficioso) of undutifulness, unless he hath received it either by being appointed heir, by having a legacy, or by means of a trust for his use; or unless his legal part hath been given him by donation* mortis causâ *or* inter vivos, *(in those cases, noticed by our constitution,) or by any other means set forth in our*

dum est, ut, sivè unus fuerit, sivè plures, quibus agere de inofficioso testamento permittitur, una quarta eis dari possit, ut ea pro ratâ eis distribuatur, id est, pro virili portione quarta.

ordinances. What we have said of the fourth or legal portion, is to be so understood, that, if there be more persons than one, who have a right to bring a plaint of undutifulness against a testament, yet one fourth will be sufficient, divided among them all in equal portions.

TITULUS DECIMUS-NONUS.

DE HÆREDUM QUALITATE ET DIFFERENTIA.

D. xxix. T. 11. C. vi. T. 31.

Divisio hæredum.

HÆREDES autem aut necessarii dicuntur, aut sui et necessarii, aut extranei.

Heirs are divided into three sorts, necessary; proper *and* necessary; *and* strangers.

De hæredibus necessariis.

§ 1. Necessarius hæres est servus hæres institutus; ideòque sic appellatur, quia, sive velit, sive nolit, omninò post mortem testatoris protinùs liber et necessarius hæres fit. Undè, qui facultates suas suspectas habent, solent servum suum primo aut secundo aut etiam ulteriore gradu hæredem instituere; ut, si creditoribus satis non fiat, potius ejus hæredis bona, quam ipsius testatoris, à creditoribus possideantur, vel distrahantur, vel inter eos dividantur. Pro hoc tamen incommodo illud ei commodum præstatur, ut ea, quæ post mortem patroni sui si-

§ 1. *A slave instituted by his master, is a necessary heir; and he is so called, because at the death of the testator he becomes instantly free, and is compellable to take the heirship; he therefore, who suspects his circumstances, commonly institutes his slave to be his heir in the first, second, or some other place; so that, if he does not leave a sum equal to his debts, the goods, which are seized, sold, or divided among his creditors, may rather seem to be those of his heir, than his own. But a slave, in recompence of this inconvenience, is allowed whatever he hath acquired*

bi acquisierit, ipsi reserventur. Et quamvis bona defuncti non sufficiant creditoribus, iterum tamen ex eâ causâ res ejus, quas sibi acquisierit, non væneunt.

after the death of his patron; for such acquisitions are not to be sold, although the goods of the deceased should be ever so insufficient for the payment of his creditors.

De suis hæredibus.

§ II. Sui autem et necessarii hæredes sunt, veluti filius, filia, nepos neptisve ex filio, et deinceps cæteri liberi, qui in potestate morientis modò fuerint. Sed, ut nepos neptisve sui hæredes sint, non sufficit eum eamve in potestate avi mortis tempore fuisse: sed opus est, ut pater ejus, vivo patre suo, desierit suus hæres esse, aut morte interceptus, aut qualibet aliâ ratione liberatus à patriâ potestate; tunc enim nepos neptisve in locum patris sui succedit. Sed sui quidem hæredes ideò appellantur, quia domestici hæredes sunt, et vivo quoque patre quodammodo domini existimantur. Undè etiam, si quis intestatus moriatur, prima causa est in successione liberorum. Necessarii verò ideò dicuntur, quia omninò, sive velint, sive nolint, tam ab intestato quam ex testamento, ex lege duodecim tabularum hæredes fiunt. Sed his prætor permittit volentibus abstinere hæreditate, ut potius parentis quam ipsorum bona similitèr à creditoribus possideantur.

§ 2. *Proper and necessary heirs, are sons, daughters, grand-sons or grand-daughters by a son or other direct descendants, in the power of the deceased at the time of his death. To constitute grand-children proper heirs, it does not suffice, that they were in the power of their grand-father at the time of his decease; but it is requisite, that their father should have ceased to be a proper heir in the life-time of his father, by having been freed, either by death or otherwise from paternal authority; for then it is, that the grand-son or grand-daughter succeeds in place of their father. Heirs are called* sui *or proper, because they are domestic; and in the very life-time of their father are reputed masters in a certain degree. Hence the children of an intestate are first in succession; and are called necessary heirs, because, willing or unwilling, they become the heirs of their parent according to the law of the* 12 *tables, whether under a testament or an intestacy. But, when children request it, the prætor permits them to ab tain from the inheritance, that the effects of their parents, rather than their own, may be seized by the creditors.*

De extraneis.

§ III. Cæteri, qui testatoris juri subjecti non sunt, extranei hæredes appellantur; itaque liberi nostri, qui in potestate nostrâ non sunt, hæredes à nobis instituti, extranei hæredes nobis videntur. Quâ de causâ et qui hæredes à matre instituuntur eodem numero sunt: quia fœminæ, in potestate, liberos non habent. Servus quoque hæres à domino institutus, et post factum testamentum ab eo manumissus, eodem numero habetur.

§ 3. *All other heirs, not subject to the power of the testator, are called strangers: thus, children, not under the power of their father, but who are constituted his heirs, are strangers in a legal sense: and so are children, instituted heirs by their mother, for a woman is not allowed to have her children under her own power. A slave also, whom his master hath instituted by testament and afterwards manumitted, is so accounted.*

De testamenti factione.

§ IV. In extraneis hæredibus illud observatur, ut sit cum eis testamenti factio, sivè hæredes ipsi instituantur, sive ii, qui in potestate eorum sunt. Et id duobus temporibus inspicitur; testamenti quidem facti tempore, ut constiterit institutio; mortis verò testatoris, ut effectum habeat. Hoc amplius, et cum adit hæreditatem, esse debet cum eo testamenti factio, sivè purè sivè sub conditione hæres institutus sit. Nam jus hæredis eo maxime tempore inspiciendum est, quo acquirit hæreditatem. Medio autem tempore, inter factum testamentum et mortem testatoris vel conditionem institutionis existentem, mutatio juris non nocet hæredi: quia, ut diximus, tria tempora inspici debent. Testamenti autem factionem non solùm is habere videtur, qui testamentum facere potest; sed etiam, qui ex alieno testamento vel ipse capere potest, vel alii acquirere, licèt non

§ 4. *As to strangers, it is requisite, that they should be capable of the faction of a testament, whether instituted heirs themselves, or whether those, under their power, are instituted. And this qualification is required at two several times; at the making of the testament, that the institution may be valid; and at the testator's death, that it may take effect: and farther, whether an heir be appointed simply or conditionally, yet he ought to be capable of the faction of a testament at the time of entering upon the inheritance; for his right is principally regarded at the time of acquiring the possession. But intermediately, between the making of the testament and the death of the testator, or the completion of the condition of the institution, the heir will not be prejudiced by incapacity or change of state; because the three points of time which we have noted, are the times to be regarded. Not*

possit facere testamentum. Et ideo furiosus, et mutus, et posthumus, et infans, et filius-familias, et servus alienus, testamenti factionem habere dicuntur. Licèt enim testamentum facere non possint, attamen ex testamento vel sibi vel alii acquirere possunt.

only a man, capable of willing, is said to have testamenti factionem; *but also any person capable of taking for the benefit of himself, or of acquiring by testament for the benefit of another: hence, persons mad, mute, or posthumous, infants, the sons of a family, or slaves not your own, may all be said to have the faction of a testament (in its passive signification.) For, although incapable of making, they are capable of acquiring by testament, either for themselves or others.*

De jure deliberandi, et de beneficio inventarii.

§ V. Extraneis autem hæredibus deliberandi potestas est de adeundâ hæreditate vel non adeundâ. Sed, sivè is, cui abstinendi potestas est, immiscuerit se bonis hæreditatis, sivè extraneus, cui de adeundâ hæreditate deliberare licet, adierit, postea relinquendæ hæreditatis facultatem non habet, nisi minor sit 25 annis: nam hujusmodi ætatis hominibus, sicut in cæteris omnibus causis, deceptis, ita et si temerè damnosam hæreditatem susceperint, prætor succurrit. Sciendum est tamen, Divum Hadrianum etiam majori 25 annis veniam dedisse, cum post aditam hæreditatem grande æs alienum, quod aditæ hæreditatis tempore latebat, emersisset. Sed hoc quidem Divus Hadrianus cuidam speciali beneficio præstitit. Divus autem Gordianus postea militibus tantummodò hoc concessit. Sed nostra benevolentia commune omnibus subjectis imperio nostro hoc

§ 5. *Strangers, appointed heirs, may deliberate 'ere they enter upon an inheritance. But, if one, who has the liberty of abstaining, or a stranger, who is permitted to deliberate, should once intermeddle, it will not afterwards be in his power to renounce the inheritance, unless he shall be under the age of twenty-five years: for the prætor, in this, as in all other cases, relieves minors, who have been deceived, and who rashly take upon themselves an injurious inheritance. Here it must be noted, that the emperor* Adrian *once gave permission to a person of full age, to relinquish an inheritance, when it appeared to be incumbered with a great debt, which had been concealed, until the heir had taken upon himself the administration. But this was granted as a special favour. The emperor* Gordian *afterwards published a constitution for the indemnification of heirs, yet confined*

beneficium præstitit: et constitutionem tam æquissimam quam nobilissimam scripsit, cujus tenorem si observaverint homines, licèt eis adire hæreditatem, et in tantùm teneri, quantùm valere bona hæreditatis contingit, ut ex hac causa neque deliberationis auxilium sit eis necessarium, nisi, omissa observatione nostræ constitutionis, et deliberandum existimaverint, et sese veteri gravamini aditionis supponere maluerint.

the force of it to those only, who were of the soldiery. But our extended benevolence hath rendered this benefit common to all our subjects, having dictated a constitution just and noble, which, if heirs will observe, they may enter upon their inheritance, and not be chargeable beyond the value of the estate; so that they need not pray time for deliberation, unless they omit to observe the tenor of our ordinance, chusing rather to deliberate, and submit themselves to the risk attending the acceptance under the ancient law.

De acquirendâ vel omittendâ hæreditate.

§ VI. Item extraneus hæres testamento institutus, aut ab intestato ad legitimam hæreditatem vocatus, potest aut pro hærede gerendo, aut etiam nudâ voluntate suscipiendæ hæreditatis, hæres fieri. Pro hærede autem gerere quis videtur, si rebus hæreditariis tanquàm hæres utatur, vel vendendo res hæreditarias, vel prædia colendo, locandove, et quoquo modo voluntatem suam declaret, vel re, vel verbo, de adeundâ hæreditate; dummodò sciat, eum, in cujus bonis pro hærede gerit, testatum intestatumve obiisse, et se ei hæredem esse. Pro hærede enim gerere, est pro domino gerere: veteres enim, hæredes pro dominis appellabant. Sicut autèm nudâ voluntate extraneus hæres fit, ita contrariâ destinatione statim ab hæreditate repellitur. Eum, qui surdus vel mutus natus, vel postea factus est, nihil prohibet

§ 6. *A stranger, instituted by testament, or called by law to a succession in a case of intestacy, may make himself accountable as heir, either by doing some act as such; or by barely signifying his acceptance of the heirship. And a man is deemed to act as the heir of an inheritance, if he treat it as his own, by selling any part of it, by cultivating the ground, or by leasing it: or declare his consent to accept it, either by act or speech; knowing that the person, with whose estate he intermeddles, is dead testate or intestate, and that he himself is the heir: for to act as heir, is to act as proprietor; and the ancients frequently used the term heir, when they would denote the proprietor. But as a stranger may become heir by a bare consent, so on the contrary, by a mere dissent, he may bar himself from an inheritance. And nothing prevents, but that a*

pro hærede gerere, et acquirere sibi hæreditatem; si tamen intelligit, quod agit.

person, who was born deaf and dumb, or became so by accident, may act as heir, and acquire the inheritance, if he know what he is doing.

TITULUS VIGESIMUS.

DE LEGATIS.

D. xxx. xxxi. xxxii. C. vi. T. 37.

Continuatio.

POST hæc videamus de legatis; quæ pars juris extra propositam quidem materiam videtur: nam loquimur de iis juris figuris, quibus per universitatem res nobis acquiruntur: sed, cum omninò de testamentis et de hæredibus, qui in testamento instituuntur, loquuti simus, non sinè causâ sequenti loco potest hæc juris matéria tractari.

We will now make some observations upon legacies; although this part of the law may not seem to fall in with the subject proposed; for we are treating of those legal methods, by which things may be acquired universally: but, as we have already spoken at large of testaments and testamentary heirs, we may not improperly proceed to the subject of legacies.

Definitio.

§ I. Legatum itaque est donatio quædam à defuncto relicta, ab hærede præstanda.

§ 1. *A legacy is a gift directed by the deceased, and to be fulfilled by the heir.*

De antiquis generibus legatorum sublatis.

§ II. Sed olim quidem erant legatorum genera quatuor; per vindicationem, per damnationem, sinendi modo, per præceptionem: et certa quædam verba cuique generi legatorum assignata erant, per quæ singula genera legatorum significa-

§ 2. *Anciently there were four kinds of legacies in use; namely,* per vindicationem, per damnationem, sinendi modo, *and* per præceptionem. *To each of these was assigned a certain form of words, by which their different species*

bantur: sed ex constitutionibus Divorum principum solemnitas hujusmodi verborum sublata est. Nostra autem constitutio, quam cum magnâ fecimus lucubratione, defunctorum voluntates validiores esse cupientes, et non verbis sed voluntatibus eorum faventes, disposuit, ut omnibus una sit natura, et quibuscunque verbis aliquid relictum sit, liceat legatariis id persequi, non solùm per actiones personales, sed etiam per in rem et per hypothecariam. Cujus constitutionis perpensum modum ex ipsius tenore perfectissimè accipere possibile est.

were signified; but these fixed forms have been wholly taken away by the imperial ordinance of the later emperors, Constantinus, Constantius, *and* Constans. *We also, desirous of enforcing the wills of deceased persons, and regarding their intentions more than their words, have, after great study, enacted that the nature of all legacies shall be the same; and that legatees, by whatever words constituted, may sue for what is left them, not only by a personal, but by a real or hypothecary action. But the reader may perfectly comprehend the well weighed matter of this constitution, from the tenor of it.*

Collatio legatorum et fidei-commissorum.

§ III. Sed non usque ad eam constitutionem standum esse existimavimus: cum enim antiquitatem invenimus legata quidem strictè concludentem, fidei-commissis autem, quæ ex voluntate magis descendebant defunctorum, pinguiorem naturam indulgentem, necessarium esse duximus, omnia, legata fidei-commissis exæquare, ut nulla sit inter ea differentia, sed, quod deest legatis, hoc repleatur ex naturâ fidei-commissorum: et, si quid amplius est in legatis, per hoc crescat fidei-commissorum natura. Sed, nè in primis legum cunabulis, perplexitatem de his exponendo, studiosis adolescentibus quandam introducamus difficultatem, operæ pretium esse duximus, interim, separatim prius de legatis et postea de fidei-

§ 3. *We have judged it expedient that our constitution should not rest here; for, observing that the ancients confined legacies within strict rules, but were favourable to gifts in trust, it was thought necessary to make all legacies equal to gifts in trust, that no difference in effect should remain between them; so that whatever is deficient in the nature of legacies, may be supplied by the nature of trusts, and whatever is abundant in the nature of legacies may become an accretion to the nature of trusts. But, that we may not raise difficulties, and perplex the minds of young persons at their entrance upon the study of the law, by explaining these things promiscuously, we have esteemed it worth our pains to treat separately, first of le-*

commissis tractare; ut, naturâ utriusque juris cognitâ, facilè possint permistionem eorum eruditi subtilioribus auribus accipere.

gacies and then of trusts, that, the nature of both being known, the student, thus instructed, may more easily understand their relation and intermixture.

De re legatâ. Et primum de re testatoris, hæredis, alienâ, cujus non est commercium.

§ IV. Non solùm autem testatoris vel hæredis res, sed etiam aliena legari potest, ita ut hæres cogatur redimere eam et præstare; vel, si eam non potest redimere, æstimationem ejus dare. Sed, si talis sit res, cujus commercium non est, vel adipisci non potest, nec æstimatio ejus debetur; veluti si quis campum martium, vel basilicas, vel templa, vel quæ publico usui destinata sunt, legaverit: nam nullius momenti tale legatum est. Quod autem diximus, alienam rem posse legari, ita intelligendum est, si defunctus sciebat, alienam rem esse, non si ignorabat. Forsitàn enim, si scivisset alienam rem esse, non legasset; et ita Divus Pius rescripsit. Et verius est, ipsum, qui agit, id est, legatarium, probare oportere, scivisse alienam rem legare defunctum, non hæredem probare oportere, ignorasse alienam: quia semper necessitas probandi incumbit illi, qui agit.

§ 4. *A testator may not only bequeath his own property, or that of his heir, but also the property of others; and, if the thing bequeathed belong to another, the heir can be obliged either to purchase and deliver it, or to render the value of it, if it can not be purchased. But, if the thing bequeathed be not in commerce, or can not be purchased, the heir is not bound to pay the value to the legatee; as if a man should bequeath the* Campus Martius, *the palaces, the temples, or any of those things, which appertain to the public: for such legacies can be of no avail. But, in saying that a testator might bequeath the goods of another, we would be understood to mean, that this can be done only, if the deceased knew, that what he bequeathed belonged to another, and not, if he were ignorant of it; since, if he had known it, he probably would not have left such a legacy: and to this purpose is the rescript of the emperor* Antoninus. *And it is incumbent upon the plaintiff or legatee to prove the deceased knew that what he left belonged to another; the heir is not obliged to prove, that the deceased did not know it; for the burthen of proof lies upon the complainant.*

De re pignoratâ.

§ V. Sed et, si rem obligatam creditori, aliquis legaverit, necesse habet hæres eam luere. Et in hoc quoque casu idem placet, quod in re alienâ; ut ita demum luere necesse habeat hæres, si sciebat defunctus, rem obligatem esse: et ita Divi Severus et Antoninus rescripserunt. Si tamen defunctus voluerit legatarium luere, et hoc expresserit, non debet hæres eam luere.

§ 5. *If a man bequeath that which he hath pledged to a creditor, the heir is under a necessity of redeeming it: but in this, as in the former case, concerning the goods of another, the heir cannot be obliged to redeem, unless the deceased knew, that the thing was pledged; and this the emperors* Severus *and* Antoninus *have declared by their rescript. But when it appears to have been the express will of the deceased, that the legatee should redeem the thing bequeathed, the heir ought not to redeem it.*

De re alienâ post testamentum à legatario acquisitâ.

§ VI. Si res aliena legata fuerit, et ejus rei vivo testatore legatarius dominus factus fuerit, siquidèm ex causâ emptionis, ex testamento actione pretium consequi potest; si verò ex causâ lucrativâ, veluti ex donatione, vel ex aliâ simili causâ, agere non potest: nam traditum est, duas lucrativas causas in eundem hominem et eandem rem concurrere non posse. Hac ratione, si ex duobus testamentis eadem res eidem debeatur, interest, utrùm rem, an æstimationem, ex testamento consecutus sit: nam, si rem habet, agere non potest; quia habet eam ex causâ lucrativâ: si æstimationem; agere potest.

§ 6. *If a thing bequeathed be the property of another, and the legatee become the proprietor of it in the lifetime of the testator, by purchase, he may recover the value, by an action under the will; but, if he obtained it as a gift, or by any lucrative title, no action will lie; for it is a maxim, that two lucrative causes can never concur in the same person and thing. And therefore, if the same specific thing be left by two testaments to the same person, the question will be, when the legatee sues under one of them, whether he hath obtained the thing itself, or the value of it, by virtue of the other? for, if he be already possessed of the thing itself, the suit is at an end, because he hath received it on a lucrative account; but, if he hath already obtained the value of it only, he may still sue for the thing itself.*

De his, quæ non sunt in rerum naturâ.

§ VII. Ea quoque res, quæ in rerum naturâ non est, si modò futura est, rectè legatur; veluti fructus, qui in illo fundo nati erunt, aut quod ex illâ ancillâ natum erit.

§ 7. *Things, which exist only in possibility, may be bequeathed: as the fruits, which shall grow on such a spot of ground; or the offspring, which shall be born of a particular slave.*

De eâdem re duobus legatâ.

§ VIII. Si eadem res duobus legata sit, sive conjunctim, sive disjunctim, si ambo perveniant ad legatum, scinditur inter eos legatum: si alter deficiat, quia aut spreverit legatum, aut vivo testatore decesserit, vel alio quoquo modo defecerit, totum ad collegatarium pertinet. Conjunctim autem legatur, veluti si quis dicat, *Titio et Seio hominem Stichum do, lego:* disjunctim ita, *Titio hominem Stichum do, lego: Seio hominem Stichum do, lego.* Sed et, si expresserit *eundum hominem Stichum*, æque disjunctim legatum intelligitur.

§ 8. *When the same specific legacy is left to two persons, either conjunctively or disjunctively, and both are willing to accept, it must be divided between them. But, should one of the legatees die in the lifetime of the testator, or dislike his legacy, or be by any means prevented from taking it, the whole vests in his co-legatee. A legacy thus worded, is in the conjunctive,* I give and bequeath my slave STICHUS to TITIUS *and* SEIUS: *but if thus, in the disjunctive,* I give and bequeath my slave STICHUS to TITIUS: I give and bequeath my slave STICHUS to SEIUS. *Although the testator add, that he gives the* same slave STICHUS to SEIUS, *yet the legacy would be understood in the disjunctive.*

Si legatarius proprietatem fundi alieni sibi legatis emerit et usus fructus ad eam pervenerit.

§ IX. Si cui fundus alienus legatus sit, et emerit proprietatem deducto usufructu, et ususfructus ad eum pervenerit, et postea ex testamento agat, rectè eum agere et fundum petere Julianus ait; quia ususfructus in petitione servitutis locum obtinet: sed officio judicis conti-

§ 9. *If a man bequeath to any one the ground of another, and the legatee purchase the property without the usufruct, which afterwards accrues to him, it is said by* Julianus, *that he may sue under the testament, and demand the ground; because the usufruct is regarded as a service on-*

netur, ut deducto usufructu jubeat æstimationem præstari.

ly. But it is the duty of a judge, in this case, to order the price of the property to be paid, deducting the value of the usufruct.

De re legatarii.

§ X. Sed, si rem legatarii quis ei legaverit, inutile est legatum; quia, quod proprium est ipsius, amplius ejus fieri non potest: et licèt alienaverit eam, non debetur, nec ipsa res, nec æstimatio ejus.

§ 10. *A man uselessly bequeaths to another, what already belongs to him; for what is already the property of a legatee, can not become more so. And, although the legatee should, after the bequest, aliene the thing bequeathed, neither the thing itself, nor the value of it, would become due to him.*

Si quis rem suam, quasi non suam, legaverit.

§ XI. Si quis rem suam quasi alienam legaverit, valet legatum: nam plus valet quod in veritate est, quam quod in opinione. Sed et, si legatarii esse putavit, valere constat; quia exitum voluntas defuncti habere potest.

§ 11. *If a testator bequeath what is his own, as if it were the property of another, the bequest would be good; for truth is more prevalent than what is founded upon opinion only. But although the testator imagine, that what he bequeaths, belongs already to the legatee, yet, if it do not, it is certain, that such a legacy would also be valid; because the will of the deceased can thus take effect.*

De alienatione et oppignoratione rei legatæ.

§ XII. Si rem suam legaverit testator, posteaque eam alienaverit, Celsus putat, si non adimendi animo vendidit, nihilominùs deberi: idemque Divi Severus et Antoninus rescripserunt. Iidem rescripserunt, eum, qui post testamentum factum prædia, quæ legata erant, pignori dedit, ademisse legatum non videri: et ideò legatarium cum hærede ejus agere posse, ut prædia

§ 12. *If a testator bequeath his own property, and afterwards alien, it is the opinion of* Celsus, *that the thing bequeathed will become due to the legatee, if the testator did not dispose of it, with an intention to oust him. The emperors* Severus *and* Antoninus *have published their rescript to this effect; and they have also signified by another rescript that a legacy afterwards pawned or*

à creditore luantur. Si verò quis partem rei legatæ alienaverit, pars, quæ non est alienata, omninò debetur: pars autem alienata, ita debetur, si non adimendi animo alienata sit.

mortgaged, shall not be considered as retracted; and that the legatee may bring suit against the heir, and oblige him to redeem. And, if but a part of the thing bequeathed be aliened, that part which remains unaliened, is still due; and that, which is aliened, is only due, if it appear not to have been aliened by the testator with a design to retract the legacy.

De liberatione legata.

§ XIII. Si quis debitori suo liberationem legaverit, legatum utile est: et nèque ab ipso debitore, nèque ab hærede ejus, potest hæres petere, neque ab alio, qui hæredis loco sit. Sed et potest à debitore conveniri, ut liberet eum. Potest etiam quis vel ad tempus jubere, ne hæres petat.

§ 13. *If a man by will discharge his debtor, the bequest is effectual; and the heir can bring no suit against the debtor, his heir or any representative. On the contrary, the heir of the testator may be convened by the debtor, and obliged to give him his discharge. A man may also forbid his heir to sue a debtor, within a time limited.*

De debito legato creditori.

§ XIV. Ex contrario si debitor creditori suo, quod debet, legaverit, inutile est legatum, si nihil plus est in legato, quam in debito: quia nihil amplius per legatum habet: quod si in diem, vel sub conditione, debitum ei pure legaverit, utile est legatum propter representationem. Quod si vivo testatore dies venerit, vel conditio extiterit, Papinianus scripsit, utile esse nihilominùs legatum, quia semel constitit: quod et verum est. Non enim placuit sententia existimantium, extinctum esse legatum, quia in eam causam

§ 14. *On the contrary, a legacy by a debtor to his creditor of the money, which he owes him, is ineffectual, if it amount merely to the value of the debt; for the creditor receives no benefit. But, if a debtor bequeath simply to his creditor a sum of money, which was to be paid at a day certain, or which he owed upon condition, the legacy will take effect on account of the representation, i. e. because it becomes due before the debt. But, according to* PAPINIAN, *if the day of payment should come, or the event of the condition happen*

pervenerit, à quâ incipere non potest.

in the life-time of the testator, the legacy would nevertheless be effectual, because it was once good; which is true. For we are not satisfied with the opinion that a legacy once good, may afterwards become extinct, by falling into a state, from which it could not have taken a legal commencement.

De dote uxori legatâ.

§ XV. Sed, si uxori maritus dotem legaverit, valet legatum: quia plenius est legatum, quam de dote actio. Sed, si, quam non accepit, dotem legaverit, Divi Severus et Antoninus rescripserunt, siquidem simpliciter legaverit, inutile esse legatum; si verò certa pecunia, vel certum corpus, aut instrumenta dotis in prælegando demonstrata sunt, valere legatum.

§ 15. *If a man bequeath to his wife her marriage portion, it is valid: for the legacy is more beneficial than the action she might maintain for the recovery of her portion. But, if he bequeath to his wife her marriage portion, never actually received, the emperors* Severus *and* Antoninus *have declared by their rescript, that, if it be left simply without any specification of a sum certain, the legacy is void; but if any sum, or thing be specified, or if the instruments, in which the exact value of the portion is mentioned, be referred to, the legacy is valid.*

De interitu et mutatione rei legatæ.

§ XVI. Si res legata sinè facto hæredis perierit, legatario decedit. Et, si servus alienus legatus sinè facto hæredis manumissus fuerit, non tenetur hæres. Si verò heredis servus legatus sit, et ipse eum manumiserit, teneri eum, Julianus scripsit: nec interest, sciverit, an ignoraverit, à se eum legatum esse. Sed et, si alii, donaverit servum, et is, cui donatus est, eum manumise-

§ 16. *If a thing bequeathed should perish before delivery, without fault of the heir, the loss falls upon the legatee. And, if the slave of another, who is bequeathed, should be manumitted, the heir not being privy to the manumission, he can be subject to no action. But, if a testator bequeath the slave of his heir, who afterwards manumits that slave, it is the opinion of* Julian, *that the*

rit, tenetur hæres; quamvis ignoraverit, a se eum legatum esse.

heir is answerable; whether he knew of the legacy or not. Also, if the heir hath made a present of a slave bequeathed, and the donee hath manumitted him, the heir is liable, although ignorant of the bequest.

De interitu quarundam ex pluribus rebus legatis.

§ XVII. Si quis ancillas cum suis natis legaverit, etiamsi ancillæ mortuæ fuerint, partus legato cedunt. Idem est, et si ordinarii servi cum vicariis legati fuerint: quia, licèt mortui sint ordinarii, tamen vicarii legato cedunt. Sed, si servus fuerit cum peculio legatus, mortuo servo, vel manumisso, vel alienato, peculii legatum extinguitur. Idem est, si fundus instructus, vel cum instrumento, legatus fuerit; nam, fundo alienato, et instrumenti legatum extinguitur.

§ 17. *If a testator bequeath his female slaves and their offspring, although the slaves die, their issue becomes due to the legatee: and so, if ordinary slaves are bequeathed together with vicarial; for although the ordinary slaves die, yet the vicarial slaves will pass by virtue of the bequest. But, where a slave is bequeathed with his* peculium, *and afterwards dies, or is manumitted, or aliened, the legacy of the* peculium *becomes extinct. The consequences will be the same, if a piece of ground is bequeathed with the instruments for improving it; for, if the testator aliens the ground, the legacy of the instruments of husbandry is of course extinguished.*

De grege legato.

§ XVIII. Si grex legatus fuerit, et postea ad unam ovem pervenerit, quod superfuerit, vindicari potest. Grege autem legato etiam eas oves, quæ post testamentum factùm gregi adjiciuntur, legato cedere Julianus ait. Est autem gregis unum corpus ex distantibus captibus, sicùt ædium unum corpus est ex cohærentibus lapidibus.

§ 18. *If a flock is bequeathed, and afterwards reduced to a single sheep, that sheep is claimable; and, if a flock receive an addition, after it hath been bequeathed, this addition will also, according to* Julian, *enure to the legatee. For a flock is deemed one body, consisting of separate members, as a house is reckoned one body, composed of materials, joined together and adhering.*

De ædibus legatis.

§ XIX. Ædibus denique legatis, columnas et marmora, quæ post testamentum factum adjecta sunt, legato dicimus cedere.

§ 19. *And lastly, when an house is bequeathed, the marble or pillars, which are added after the bequest is made, will pass under the general legacy.*

De peculio.

§ XX. Si peculium legatum fuerit, sinè dubio quicquid peculio accedit vel decedit, vivo testatore, legatarii lucro vel damno est. Quod si post mortem testatoris antè aditam hæreditatem aliquid servus acquisierit, Julianus ait, siquidèm ipsi manumisso peculium legatum fuerit, omne, quod antè aditam hæreditatem acquisitum est legatario cedere; quia hujusmodi legati dies ab adita hæreditate cedit: sed, si extraneo peculium legatum fuerit, non cedere ea legato, nisi ex rebus peculiaribus auctum fuerit peculium. Peculium autem, nisi legatum fuerit, manumisso non debetur: quamvis, si vivus manumiserit, sufficit, si non adimatur: et ita Divi Severus et Antoninus rescripserunt. Iidem rescripserunt, peculio legato, non videri id relictum, ut petitionem habeat pecuniæ, quam in rationes dominicas impenderit. Iidem rescripserunt, peculium videri legatum, cum rationibus red-

§ 20. *When the* peculium *(of a slave) is bequeathed, it is certain, that the increase or decrease of it, in the life of the testator, becomes the loss or gain of the legatee. And, if the* peculium *of a slave be left to him with his liberty, and he increase the* peculium, *subsequent to the death of the testator, and before the inheritance is entered upon, it is the opinion of* Julian, *that the increase will pass to him as legatee; for such a legacy does not become due, but from the day of the acceptance of the inheritance: but should the* peculium *of a slave be bequeathed to a stranger, an increase, acquired within the period above-mentioned, will not pass under the legacy, unless the acquisition were made, by means of something appertaining to the* peculium; *for the* peculium *of a slave does not belong to him, after he is manumitted by testament, unless expressly given: although, if a master in his life-time manumit his*

ditis liber esse jussus est, et ex eo reliqua inferre.

slave, his peculium *will pass to him of course, if not excepted: and such is the rescript of the emperors* SEVERUS *and* ANTONINUS; *who have also declared, that when a* peculium *is bequeathed to a slave, it does not seem intended that he should have the right of demanding what he may have expended for the use of his master. The same princes have farther declared, that a slave seems intitled to his* peculium, *if his liberty be left him, on condition, that he will bring in his accounts, and supply any deficiency out of the profits of his* peculium.

De rebus corporalibus et incorporalibus.

§ XXI. Tam autem corporales res legari possunt, quam incorporales: et ideò, quod defuncto debetur, potest alicui legari, ut actiones suas hæres legatario præstet; nisi exegerit vivus testator pecuniam: nam hoc casu legatum extinguitur. Sed et tale legatum valet; *damnas esto hæres meus domum illius reficere:* vel *illum ære alieno liberare.*

§ 21. *Things incorporeal may be bequeathed as well as things corporeal: and so therefore may a debt, due to the testator; and the heir be obliged to transfer his right of action to the legatee; unless the testator in his life-time received the money due to him; for in this case the legacy would become extinct. Such a legacy as this, is also good;* I command my heir to rebuild the house of TITIUS: *or* to free him from his debts.

De legato generali.

§ XXII. Si generalitèr servus, vel res alia, legetur, electio legatarii est, nisi aliud testator dixerit.

§ 22. *If a testator bequeath a slave, or else some particular thing disjunctively, the right of election is in the legatee, unless the testator hath declared otherwise.*

De optione legatâ.

§ XXIII. Optionis legatum, id est, ubi testator ex servis suis vel

§ 23. *An optional legacy, is when a testator directs his legatee to chuse*

aliis rebus optare legatarium jusserat, habebat olim in se conditionem: et ideò, nisi ipse legatarius vivus optasset, ad hæredem legatum non transmittebat. Sed ex constitutione nostrâ et hoc in meliorem statum reformatum est, et data est licentia hæredi legatarii optare servum, licèt vivus legatarius hoc non fecerit. Et, diligentiore tractuta habito, hoc in nostrâ constitutione additum est, sivè plures legatarii extiterint, quibus optio relicta est, et dissentiant in corpore eligendo; sivè unius legatarii plures hæredes sint, et inter se circa optandum dissentiant, alio aliud corpus eligere cupiente, ne pereat legatum, (quod plerique prudentium contra benevolentiam introducebant,) fortunam esse hujus optionis judicem, et fortè hoc esse dirimendum, ut, ad quem sors pervenerit, illius sententia in optione præcellat.

any slave, from among his slaves, or any article from a certain class of things; and such legacy was formerly presumed to imply this condition, that, if the legatee in his lifetime did not make his election, the legacy could not be transmitted to his heir. But, by our constitution, this presumed condition is now taken away, and the heir of the legatee is permitted to elect, although the legatee in his life-time hath neglected to do it. And, upon further consideration, we have added to our constitution, that, if there be several legatees, to whom an option is left, and they differ in their choice, or if there be many heirs of one legatee, of divers sentiments, then Fortune *must be the judge: for, lest the loss of the legacy should ensue, (which the generality of ancient lawyers, contrary to all benevolence, would have permitted,) we have decreed, that such dissensions should be decided by lot; so that his option, to whom the lot falls, shall be preferred.*

Quibus legari potest.

§ XXIV. Legari autem illis solùm potest, cum quibus testamenti factio est.

§ 24. *A legacy can be left to those only, who have the capacity of taking by testament, (i. e.* factio passiva.)

Jus antiquum de incertis personis.

§ XXV. Incertis verò personis neque legata neque fidei-commissa olim relinqui concessum erat; nam ne miles quidem incertæ personæ poterat relinquere, ut Divus Hadrianus rescripsit. Incerta autem persona videbatur, quam incertâ opi-

§ 25. *It was not permitted formerly, that either legacies, or gifts in trust, should be bequeathed to incertain persons; this was even prohibited to a soldier, by the emperor* Adrian. *An incertain person is one whom the testator has figured in*

nione animo suo testator subjiciebat, veluti, si quis ita dicat, *quicunque filio meo filiam suam in matrimonium dederit, ei hæres meus illum fundum dato.* Illud quoque, quod iis relinquebatur, qui *post testamentum scriptum primi consules designati essent*, æque incertæ personæ legari videbatur: et denique multæ aliæ hujusmodi species sunt. Libertas quoque incertæ personæ non videbatur posse dari, quia placebat, nominatim servos liberari. Sub certâ verò demonstratione, id est, ex certis personis, incertæ personæ rectè legabatur: veluti, *ex cognatis meis, qui nunc sunt, si quis filiam meam uxorem duxerit, ei hæres meus illam rem dato.* Incertis autem personis legata vel fidei-commissa relicta, et per errorem soluta, repeti non posse, sacris constitutionibus cautum erat.

his imagination, without any determinate knowledge; as if he should say: whoever shall give his daughter in marriage to my son, to that person let my heir deliver up such a piece of ground. *And, if he had made a bequest* to the first consuls appointed after his testament was written, *this also would have been a bequest to incertain persons; and there are other similar examples. Freedom likewise could not be conferred upon an incertain person; for it was necessary, that all slaves should be nominally infranchised: but a legacy might have been given to an incertain person under a certain demonstration; or, in other words, to an incertain person, being one of a number of persons certain: as,* I direct my heir to give such a thing to any one of my present collateral relations, who shall take my daughter in marriage. *But, if a legacy or fiduciary gift had been paid to incertain persons by mistake, it was provided by the constitutions, that such persons were not compellable to refund.*

Jus antiquum de posthumo alieno.

§ XXVI. Posthumo quoque alieno inutilitèr antea legabatur. Est autem alienus posthumus, qui natus inter suos hæredes testatori futurus non est: ideòque, ex emancipato filio conceptus nepos, extraneus erat posthumus avo.

§ 26. *Formerly a legacy could not enure to a posthumous stranger: that is, to one who, if he had been born before the death of the testator, could not have been numbered among his proper heirs: and of consequence a posthumous grandson, by an emancipated son, was a posthumous stranger in regard to his grandfather.*

Jus novum de personis incertis et posthumo alieno.

§ XXVII. Sed nec hujusmodi species penitùs est sinè justa emendatione relicta, cùm in nostro codice constitutio posita sit, per quam et huic parti medemur, non solùm in hæreditatibus, sed etiam in legatis et fidei-commissis: quod evidentèr ex ipsius constitutionis lectione clarescit. Tutor autem nec per nostram constitutionem incertus dari debet: quia certo judicio debet quis pro tutelâ suæ posteritati cavere.

§ 27. *But the ancient law hath not been left without proper emendation; for a constitution in our collection hath altered the law concerning incertain persons, not only in respect of inheritances, but also legacies and fiduciary bequests. This alteration will appear from the constitution itself; which gives no authority to the nomination of an incertain tutor; for it is incumbent upon every parent to take care of his posterity in this respect, by a determinate appointment.*

De posthumo alieno hærede instituto.

§ XXVIII. Posthumus autèm alienus hæres instituti et antè poterat, et nunc potest; nisi in utero ejus sit, quæ jure nostro, uxor esse non potest.

§ 28. *A posthumous stranger could formerly, and may now be appointed heir, unless it appear, that he was conceived by a woman, who could not have been legally married to his father.*

De errore in nomine legatarii.

§ XXIX. Siquidem in nomine, cognomine, prænomine, agnomine, legatarii testator erraverit, cum de persona constat, nihilominus valet legatum; idèmque in hæredibus servatur; et rectè: nomina enim significandorum hominum gratia reperta sunt; qui si alio quolibet modo intelligantur, nihil interest.

§ 29. *Although a testator may have mistaken the* nomen, cognomen, prænomen *or* agnomen *of a legatee, yet, if his person be certain, the legacy is good. The same rule is observed as to heirs, and with reason: for the use of names is but to point out persons; and, if they can be denoted by any other method, it will make no difference.*

De falsa demonstratione.

§ XXX. Huic proxima est illa juris regula, falsâ demonstratione legatum non perimi: veluti, si quis ita legaverit, *Stichum servum*

§ 30. *The rule of law, which comes nearest to the foregoing, is, that a legacy is not rendered null by a false description: suppose a be-*

meum vernam do, lego. Licet enim non verna, sed emptus sit, si tamen de servo constat, utile est legatum. Et convenientèr, si ita demonstraverit, *Stichum servum, quem a Seio emi*, sitque ab alio emptus, utile est legatum, si de servo constat.

quest thus worded: I give and bequeath STICHUS my slave, who was born in my family: *in this case, although* Stichus *was not born in the family, but bought, yet, if there be certainty of his person, the legacy is valid. And if a testator should write:* I bequeath STICHUS my slave, whom I bought of SEIUS; *yet, although bought of another, the legacy would be good, if no doubt existed as to the person of* STICHUS.

De falsa causa adjecta.

§ XXXI. Longè magis legato falsa causa adjecta non nocet: veluti cum quis ita dixerit: *Titio, quia me absente negotia mea curavit, Stichum do, lego:* vel ita, *Titio, quia patrocinio ejus, capitali crimine liberatus sum, Stichum do, lego.* Licèt enim neque negotia testatoris unquam gesserit Titius, neque patrocinio ejus liberatus sit, legatum tamen valet. Sed, si conditionalitèr enunciata fuerit causa, aliud juris est; veluti hoc modo, *Titio, si negotia mea curaverit, fundum meum do, lego.*

§ 31. A fortiori *a legacy is not rendered less valid, although a false reason be assigned for bequeathing it: as if a testator should say:* I give my slave STICHUS to TITIUS, because he took care of my affairs in my absence: *or,* because I was acquitted upon a capital accusation, by his protection. *For although* Titius *had never taken care of the affairs of the deceased, and although the testator was never thus acquitted by means of* Titius, *the legacy will be good. But if the bequest had been conditional, as* I give to TITIUS, such a piece of ground, if it shall appear, that he hath taken proper care of my affairs, *then the law would be different.*

De servo hæredis.

§ XXXII. An servo hæredis rectè legemus, quæritur: et constat, purè inutilitèr legari, nec quicquam proficere, si vivo testatore de potestate hæredis exierit: quia, quod inutile foret legatum, si statim post

§ 32. *It is doubted, whether a testator can bequeath to the slave of his heir; and it is settled that such a legacy, would be of no avail, although the slaves should be freed from the power of the heir in the life-time of*

factum testamentum decessisset testator, hoc non debet ideò valere, quia diutiùs testator vixerit. Sub conditione verò rectè legatur servo, ut requiramus, an, quo tempore dies legati cedit, in potestate hæredis non sit.

the testator; for a bequest, void if the testator had expired immediately after he had made it, ought not to become valid, merely because he happened to enjoy a longer life. But a testator may give a conditional legacy to the slave, (of his instituted heir,) which will be good, if the slave be not under power of the heir, when the condition is fulfilled.

De domino hæredis.

§ XXXIII. Ex diverso, hærede instituto servo, quin domino rectè etiam sinè conditione legetur, non dubitatur: nam, etsi statim post factum testamentum decesserit testator, non tamen apud eum, qui hæres sit, dies legati cedere intelligitur: cùm hæreditas à legato separata sit, et possit per eum servum alius hæres effici, si prius, quam jussu domini adeat, in alterius potestatem translatus sit; vel manumissus ipse hæres efficitur: quibus casibus utile est legatum. Quod si in eâdem causâ permanserit, et jussu legatarii adierit, evanescit legatum.

§ 33. *On the contrary it is not doubted, but if a slave be appointed heir, that his master may take an unconditional legacy (by the same testament:) for, although the testator should die instantly, yet the legacy does not become immediately due from the slave who is heir; for the inheritance is here separate from the legacy, and another may become heir by means of the slave, if he should be transferred to a new master, before he hath entered upon the inheritance, at the command of his master, who is the legatee; or the slave himself may become heir in his own right by manumission; and, in these cases, the legacy would be good. But, if the slave should remain in the same state, and enter upon the inheritance by order of his master, who is the legatee, the legacy becomes extinct.*

De modo et ratione legandi. De ordine scripturæ.

§ XXXIV. Ante hæredis institutionem inutiliter antea legabatur; scilicèt, quia testamenta, vim ex institutione hæredis accipiunt, et ob id veluti caput atque fundamen-

§ 34. *A legacy could not formerly take effect, until the heir was instituted; because a testament receives its force and efficacy from the institution of the heir: by parity of rea-*

tum, intelligitur totius testamenti hæredis institutio. Pari ratione, nec libertas ante hæredis institutionem dari poterat. Sed, quia incivile esse putavimus, scripturæ ordinem quidem sequi, (quod et ipsi antiquitati vituperandum fuerat visum,) spernì autem testatoris voluntatem, per nostram constitutionem et hoc vitium emendavimus, ut liceat et antè hæredis institutionem et inter medias hæredum institutiones legatum relinquere, et multò magis libertatem, cujus usus favorabilior est.

son the institution of an heir should always precede the grant of freedom. But we have thought it wrong that the mere order of writing should be attended to, in opposition to the express intention of a testator: and the ancients themselves seem to have thought so: we have therefore, by our constitution, amended the law in this point; so that a legacy, and à fortiori, *a grant of liberty, which is always favoured, may now be bequeathed, before the institution of an heir, (where there is but one; and, either before, or between the institutions of heirs, where there are several.)*

De legato post mortem hæredis, vel legatarii.

§ XXXV. Post mortem quoque hæredis aut legatarii simili modo inutilitèr legabatur: veluti, si quis ita dicat, *cum hæres meus mortuus fuerit, do, lego:* item *pridie quam hæres aut legatarius morietur.* Sed simili modo et hoc correximus, firmitatem hujusmodi legatis ad fidei-commissorum similitudinem præstantes; ne in hoc casu deterior causa legatorum, quam fidei-commissorum, inveniatur.

§ 35. *A bequest, made to take place after the death of an heir or legatee, was also ineffectual: for, if a testator had said,* when my heir is dead, I give and bequeath, *or even thus,* I give and bequeath the day preceding the day of the death of my heir, *or,* of my legatee, *the legacies were void. But we have corrected the ancient rule in this respect, by giving all such legacies the same validity, as gifts in trust; lest trusts should be found to be more favoured, than legacies.*

Si pœnæ nomine relinquatur, adimatur, vel transferatur.

§ XXXVI. Pœnæ quoque nomine inutilitèr antea legabatur, et adimebatur, vel transferebatur. Pœnæ autem nomine legari videtur, quod coercendi hæredis causâ relinquitur, quo magis aliquid faciat,

§ 36. *Also formerly, if a testator had given, revoked, or transferred a legacy* nomine pœnæ, *he would have acted ineffectually: and a legacy is reputed to be bequeathed* nomine pœnæ, [i. e. *as a punishment or penal-*

aut non faciat: veluti si quis ita scripserit, *hæres meus si filiam suam in matrimonium Titio collocaverit; vel ex diverso, si non collocaverit, dato decem aureos Seio;* aut si ita scripserit, *hæres meus si servum Stichum alienaverit*: vel ex diverso, *si non alienaverit, Titio decem aureos dato.* Et in tantùm hæc regula observabatur, ut quam plurimis principalibus constitutionibus significaretur, nec principem agnoscere, quod ei pœnæ nomine legatum sit: nec ex militis quidem testamento talia legata valebant: quamvis aliæ militum voluntates in ordinandis testamentis valdè observabantur: quinetiam nec libertates pœnæ nomine dari posse placebat: eo ampliùs, nec hæredem pœnæ nomine adjici posse, Sabinus existimabat: veluti si quis ita dicat, *Titius hæres esto; si Titius filiam suam in matrimonium Seio collocaverit, Seius quoque hæres esto.* Nihil enim intererat, quâ ratione Titius coerceretur, utrum legati datione, an coheredis adjectione. Sed hujusmodi scrupulositas nobis non placuit; et generaliter ea, quæ relinquuntur, licèt pœnæ nomine fuerint relicta vel adempta, vel in alium translata, nihil distare à cæteris legatis constituimus, vel in dando, vel in adimendo, vel in transferendo: exceptis videlicèt iis, quæ impossibilia sunt, vel legibus interdicta, aut alias probrosa. Hujusmodi enim testamentorum dispositi, *when an heir is put under the necessity of doing or not doing something; as if a testator had thus written;* if my heir give his daughter in marriage to TITIUS; *or*, if he do not give her in marriage to TITIUS, let him pay ten AUREI to SEIUS: *or thus*, if my heir shall alien my slave STICHUS; *or*, if my heir shall not alien my slave STICHUS, let him pay ten AUREI to TITIUS. *And this rule was so far observed, that it was expressly ordained by many constitutions, that even the emperor could not receive a legacy, which was bequeathed* nomine pœnæ; *nor could a penal legacy be valid, even when bequeathed by the testament of a soldier; although, in every other respect, the intention of a testator in a military testament was scrupulously adhered to. And even freedom could not be bequeathed, nor, in the opinion of* SABINUS *could an heir be added in a testament,* nomine pœnæ: *for, if a testator had said,* let TITIUS be my heir, but if he give his daughter in marriage to SEIUS, let SEIUS also be my heir, *the appointment of* Seius *would have been void; for the manner, in which an heir was laid under coercion, whether by the gift of a legacy, or by the addition of another heir, worked no alteration in the general rule of law. But this strictness hath not pleased us, and we have therefore ordained generally that things left, revoked, or transferred,* nomine

tiones valere secta meorum temporum non patitur.

pœnæ, *should fall under the same rules of law as other legacies, whereof the condition is neither impossible, prohibited by law, or contrary to good manners, for the morality, of the present times, will not suffer testamentary dispositions of this character.*

TITULUS VIGESIMUS-PRIMUS.

DE ADEMPTIONE LEGATORUM ET TRANSLATIONE.

D. xxxiv. T. 4.

De ademptione.

ADEMPTIO legatorum, sivè eodem testamento adimantur, sivè codicillis, firma est. Sed et, sivè contrariis verbis fiat ademptio, veluti si quod ita quis legaverit, *do, lego*, ita adimatur, *non do, non lego*: sivè non contrariis, sed aliis quibuscumque verbis.

A revocation of a legacy is valid, although inserted in the same testament or codicil. And it is immaterial, whether the revocation be made in some form of words contrary to the bequest; as when a testator bequeaths in these terms, I give and bequeath to TITIUS, *and revokes it by adding,* I do not give and bequeath to TITIUS: *or in any other form.*

De translatione.

§ I. Transferri quoque legatum ab alio ad alium potest; veluti si quis ita dixerit, *hominem Stichum, quem Titio legavi, Seio do, lego*: sivè in eodem testamento, sivè codicillis, id fecerit: quo casu, simul et Titio adimi videtur, et Seio dari.

§ 1. *A legacy may also be transferred from one person to another; as,* I give to SEIUS my slave STICHUS, whom I have bequeathed to TITIUS. *This may be done in the same testament or codicil; and thus a legacy may be taken from* TITIUS *and transferred to* SEIUS.

TITULUS VIGESIMUS-SECUNDUS.

DE LEGE FALCIDIA.

D. xxxv. T. 2. C. vi. T. 50. Nov. 1.

Ratio et summa hujus legis.

SUPEREST, ut de lege Falcidia dispiciamus, quâ modus novissimè legatis impositus est. Cum enim olim lege duodecim tabularum libera erat legandi potestas, ut liceret vel totum patrimonium legatis erogare; quippè, cum eâ lege ita cautum esset, *uti quisque legassit suæ rei, ita jus esto*, visum est hanc legandi licentiam coarctare; idque ipsorum testamentorum gratiâ provisum est, ob id, quod plerùmque intestati moriebantur, recusantibus scriptis hæredibus pro nullo aut minimo lucro hæreditates adire. Et, cum super hoc tam lex Furia, quam lex Voconia latæ sunt, quarum neutra sufficiens ad rei consummationem videbatur, novissimè lata est lex Falcidia, quâ cavetur, ne plus legare liceat, quam dodrantem totorum bonorum; id est, ut, sivè unus hæres institutus sit, sivè plures, apud eum eosve pars quarta remaneat.

It remains to speak of the law Falcidia, *by which legacies have received their latest regulation. By the law of the* 12 *tables*, uti quisque legassit suæ rei, ita jus esto, *a testator was permitted to dispose of his whole patrimony in legacies: but it was thought proper to restrain this licence even for the benefit of testators themselves, because they frequently died intestate, their heirs refusing to enter upon an inheritance, from which they could receive little or no profit. And this gave rise first to the law* Furia, *and afterwards the law* Voconia: *but neither of these being found adequate to the purpose, the* Falcidian *law was at length enacted; which forbids a testator to give more in legacies, than three fourths of all his effects; so that, whether there be one or more heirs, there must now remain to him, or them, an intire fourth part of the whole.*

De pluribus hæredibus.

§ I. Et, cum quæsitum esset, duobus hæredibus institutis (veluti Titio et Seio) si Titii pars aut tota exhausta sit legatis, quæ nominatim ab eo data sunt, aut supra modum onerata, à Seio verò aut nulla relic-

§ 1. *When two heirs are instituted, as* Titius *and* Seius, *and* Titius's *part of the inheritance is overcharged by specific legacies; while* Seius's *part is wholly free or only partially incumbered; it hath*

ta sint legata, aut quæ partem ejus duntaxàt in partem diminuant, an, quia is quartam partem totius hæreditatis, aut amplius habet, Titio nihil ex legatis, quæ ab eo relicta sunt, retinere liceat, ut quartam partem suæ partis salvam habeat? placuit posse retinere. Etenim in singulis hæredibus, ratio legis Falcidiæ ponenda est.

been queried, whether, although Seius *hath a fourth or more of the whole inheritance, it may not be lawful nevertheless for* Titius *to make a stoppage out of the legacies, with which he is charged, so as to retain a fourth part out of his own moiety? and it hath been determined, that he may: for the reason of the law* Falcidia *extends to each heir.*

Quo tempore spectatur quantitas patrimonii, ad quam, ratio legis Falcidiæ redigitur.

§ II. Quantitas autem patrimonii, ad quam ratio legis Falcidiæ redigitur, mortis tempore spectatur. Itaque, (verbi gratiâ) si is, qui centum aureorum patrimonium in bonis habeat, centum aureos legaverit, nihil legatariis prodest, si ante aditam hæreditatem per servos hæreditarios, aut ex partu ancillarum hæreditariarum, aut ex fœtu pecorum, tantum accesserit hæreditati, ut, centum aureis legatorum nomine erogatis, hæres quartam partem hæreditatis habiturus sit: sed necesse est, ut nihilominus quarta pars legatis detrahatur. Ex diverso, si septuaginta quinque legaverit, et ante aditam hæreditatem in tantum decreverint bona, (incendiis forte, aut naufragiis, aut morte servorum) ut non amplius quam septuaginta quinque aureorum substantia vel etiam minus relinquatur, solida legata debentur. Nec ea res damnosa est hæredi, cui liberum est non adire hæreditatem: quæ res efficit, ut sit necesse legatariis, ne destituto testamento nihil conse-

§ 2. *The law* Falcidia *looks to the quantity of the estate at the time of the death of the testator; and therefore, if he, who is worth but an hundred* aurei *at his decease, bequeath them all in legacies, the legatees must suffer a defalcation; for they will be entitled to no advantage, although the inheritance, after the death of the testator and before it is entered upon, should so increase by the acquisition of slaves, the children of female slaves, or the product of cattle, that, after a full payment of the* 100 aurei *in legacies, an intire fourth of the whole estate might remain to the heir; the legacies notwithstanding would still be liable to a deduction of one fourth. On the contrary, if the same testator hath bequeathed only* 75 aurei, *then, although before the entrance of the heir, the estate should so decrease by fire, shipwreck, or the loss of slaves, that its whole value should not be more than* 75 aurei, *or less, yet the legacies would still be due without defalcation: nor is this law prejudical to an heir, who*

quantur, cum hærede in portione pacisci.

is always at his election either to refuse or accept an inheritance; but it obliges legatees to compromise with the heir, lest they should lose the whole for want of some one to act.

Quæ detrahuntur antè Falcidiam.

§ III. Cum autem ratio legis Falcidiæ ponitur, antè deducitur æs alienum, item funeris impensa, et pretia servorum manumissorum: tunc demùm in reliquo ita ratio habetur, ut ex eo quarta pars apud hæredam remaneat, tres vero partes inter legatarios distribuantur, pro ratâ scilicèt portione ejus, quod cuique eorum legatum fuerit. Itaque, si fingamus, quadringentos aureos legatos esse, et patrimonii quantitatem, ex quâ legata erogari oportet, quadringentorum esse, quarta pars singulis legatariis debet detrahi. Quod si trecentos quinquaginta legatos fingamus, octava debet detrahi. Quod si quingentos legaverit, initio quinta, deinde quarta, detrahi debet. Antè enim detrahendum est quod extra bonorum quantitatem est, deindè quod ex bonis apud hæredem remanere oportet.

§ 3. *The* Falcidian *portion is not taken until the debts, funeral expenses, and the price of the manumission of slaves, have been deducted; and then the fourth part of the remainder appertains to the heir, and the other three parts are divided among the legatees in a ratable proportion: for example, let it be supposed, that* 400 aurei *have been bequeathed, and the estate, turns out to be worth no more, a fourth must be subtracted from each legacy; but, if the testator gave in legacies no more than* 350 aurei, *and there remained after debts paid* 400, *then an eighth only ought to be deducted. And, if* 500 aurei *have been bequeathed, and there remain clear in the hands of the heir but* 400, *a fifth must first be deducted, and then a fourth: but that, which exceeds the real value of the goods of the deceased, must first be subtracted, and then follows the deduction of what is due to the heir.*

TITULUS VIGESIMUS-TERTIUS.

DE FIDEI-COMMISSARIIS HÆREDITATIBUS.

D. xxxvi. T. 1. C. vi. T. 42. et 49. Nov. 39. 108.

Continuatio.

NUNC transeamus ad fidei-commissa. Sed priùs est, ut de hæreditatibus fidei-commissariis videamus.

Let us now proceed to trusts; but first, we will treat of fiduciary inheritances.

Origo fidei-commissorum.

§ I. Sciendum itaque est, omnia fidei-commissa primis temporibus infirma fuisse; quia nemo invitus cogebatur præstare id, de quo rogatus erat. Quibus enim non poterant hæreditatem vel legata relinquere, si relinquebant, fidei committebant eorum, qui capere ex testamento poterant. Et ideò fidei-commissa appellata sunt, quia nullo vinculo juris, sed tantùm pudore eorum, qui rogabantur, continebantur. Postea Divus Augustus primus, semèl iterùmque gratiâ personarum motus, vel quia per ipsius salutem rogatus quis diceretur, aut ob insignem quorundam perfidiam, jussit consulibus auctoritatem suam interponere: quod, quia justum videbatur et populare erat, paulatim conversum est in assiduam jurisdictionem; tantusque eorum favor factus est, ut paulatim etiam prætor proprius crearetur, qui de fidei-commissis jus diceret, quem fidei-commissarium appellabant.

§ 1. *It must be observed, that anciently all trusts were weak and precarious; for no man could be compelled to perform what he was only* requested *to perform. But when testators were desirous of giving an inheritance or legacy to persons, to whom they could directly give neither, they then bequeathed in trust to some person capable of taking; and such bequests were called fiduciary, because the performance could not be enforced by law, but depended solely upon the honour of the trustee. The emperor* Augustus, *having been frequently moved with compassion on account of some persons, and detesting the perfidy of others, commanded the consuls to interpose their authority; and this, being a just and popular command, gave them by degrees a continued jurisdiction; and in process of time, trusts became so common, and were so highly favoured, that a prætor was purposely appointed to give judgment in these cases, and was therefore called the commissary of trusts.*

De fidei-commisso hæredis scripti.

§ II. In primis igitur sciendum est, opus esse, ut aliquis recto jure testamento hæres instituatur, ejusque fidei committatur, ut eam hæreditatem alii restituat: alioquì inutile est testamentum, in quo nemo hæres instituitur. Cum igitur aliquis scripserit, *Lucius Titius hæres esto*, potest adjicere, *rogo te, Luci Titi, ut, cum primum poteris hæreditatem meam adire, eam Caio Seio reddas, restituas.* Potest autem quisque et de parte restituendâ hæredem rogare; et liberum est vel purè, vel sub conditione, relinquere fidei-commissum, vel ex certo die.

§ 2. *We should first observe, that there must be an heir appointed to every testament: to whom it is entrusted in confidence that he will restore the inheritance to some other person; for without an heir, a testament is ineffectual. And therefore, when a testator says;* let LUCIUS TITIUS be my heir; *he may add,* and I request you, LUCIUS TITIUS, that, so soon as you enter upon my inheritance, you would restore it to CAIUS SEIUS. *But a testator may request his heir to restore a part of the inheritance only, and may make him a trustee upon condition, or from a day certain.*

Effectus restitutionis hæreditatis.

§ III. Restitutâ autem hæreditate, is quidem, qui restituit, nihilominùs hæres permanet; is verò, qui recipit hæreditatem, aliquandò hæredis, aliquando legatarii, loco habetur.

§ 3. *After an heir hath restored the inheritance, he still continues heir. But he, who hath received the inheritance, is sometimes considered as in the place of the heir, and sometimes of a legatee.*

De senatus-consulto Trebelliano.

§ IV. Et Neronis quidem temporibus, Trebellio Maximo et Annæo Seneca coss. senatus-consultum factum est, quo cautum est, ut, si hæreditas ex fidei-commissi causâ restituta sit, omnes actiones, quæ jure civili hæredi et in hæredem competerent, ei et in eum darentur, cui ex fidei-commisso restituta esset hæreditas. Post quod senatus-consultum, prætor utiles actiones ei et in eum, qui recepit hæ-

§ 4. *In the reign of* NERO, TREBELLIUS MAXIMUS *and* ANNÆUS SENECA *being consuls, a decree passed in the senate, that, when an inheritance was restored under a trust, all actions, which by the civil law might be brought by or against the heir, should be given to and against him, to whom the inheritance was restored. After this decree, the prætor began to give equitable and beneficial actions to and against the*

reditatem, quasi hæredi et in hæredem, dare cœpit.

receiver of an inheritance, as if he were the heir.

De senatus-consulto Pegasiano.

§ V. Sed, quia hæredes scripti, cum aut totam hæreditatem, aut penè totam, plerumque restituere rogabantur, adire hæreditatem ob nullum vel minimum lucrum recusabant, atque ob id extinguebantur fidei-commissa: postea Vespasiani Augusti temporibus, Pegaso et Pusione consulibus, senatus censuit, ut ei, qui rogatus esset hæreditatem restituere, perindè liceret quartam partem retinere, atque ex lege Falcidia ex legatis retinere conceditur. Ex singulis quoque rebus, quæ per fidei-commissum relinquuntur, eadem retentio permissa est. Post quod senatus-consultum, ipse hæres onera hæreditaria sustinebat: ille autem, qui ex fidei-commisso recipiebat partem hæreditatis, legatarii partiarii loco erat; id est, ejus legatarii, cui pars bonorum legabatur; quæ species legati *partitio* vocabatur, quia cum hærede legatarius partiebatur hæreditatem. Undè, quæ solebant stipulationes inter hæredem et partiarium legatarium interponi, eædem interponebantur inter eum, qui ex fidei-commisso recepit hæreditatem et hæredem; id est, ut lucrum et damnum hæreditarium pro ratâ parte inter eos commune esset.

§ 5. *But, when written heirs were requested to restore the whole, or almost the whole, of an inheritance, they often refused to accept it, since they could receive but little or no emolument; and thus trusts were frequently extinguished. Afterwards, in the consulate of* Pegasus *and* Pugio, *in the reign of the emperor* Vespasian, *the senate decreed, that an heir, who was requested to restore an inheritance, might retain a fourth, as in the case of legacies by the* Falcidian *law. And the same deduction is allowed from particular things, which are left to him as trustee. For some time after this decree, the heir alone bore the burden (expence and charges) of the inheritance; but afterwards, whoever had received a share or part of an inheritance, under a trust, was regarded as a part legatee; having a legacy of part of the property: and this species of legacy was called* partition, *because the legatee took a part of the inheritance together with the heir; thence it arose, that the same stipulations, which were formerly used between the heir and legatee in part, were also interposed between the person benefited under the trust and the heir or trustee, to the intent, that the profit and loss might be in common between them in due proportion.*

Quibus casibus locus est senatus-consulto Trebelliano vel Pegasiano.

§ VI. Ergò, siquidèm non plus quam dodrantem hæreditatis scriptus hæres rogatus sit restituere, tum ex Trebelliano senatus-consulto restituebatur hæreditas; et in utrùmque actiones hæreditariæ pro parte ratâ dabantur: in hæredem quidem jure civili; in eum verò, qui recipiebat hæreditatem ex senatus-consulto Trebelliano, tanquam in hæredem. At, si plus quam dodrantem, vel etiam totam hæreditatem, restituere rogatus esset, locus erat Pegasiano senatus-consulto: et hæres, qui semel adierat hæreditatem, (si modo suâ voluntate adierat,) sivè retinuerat quartam partem, sivè retinere noluerat, ipse universa onera sustinebat. Sed, quartâ quidem retentâ, quasi *partis* et *pro parte* stipulationes interponebantur, tanquam inter partiarium legatarium et hæredem: si verò totam hæreditatem restitueret, emptæ et venditæ hæreditatis stipulationes interponebantur. Sed, si recusabat scriptus hæres adire hæreditatem, ob id, quod diceret eam sibi suspectam esse, quasi damnosam, cavebatur Pegasiano senatus-consulto, ut, desiderante eo, cui restituere rogatus esset, jussu prætoris adiret, et restituerit hæreditatem; perindèque ei et in eum, qui reciperit hæreditatem, actiones darentur, ac juris est ex Trebelliano senatus-consulto; quo casu nullis stipulationibus est opus: quia, simul et huic, qui restituit, securitas

§ 6. *Therefore, if a written heir, or heir in trust, had not been requested to surrender more than three fourths of the inheritance, he was obliged to restore so much of it, by virtue of the* Trebellian senatus-consultum; *and all actions, whether in favour of, or against, the inheritance, were brought, or sustained, by the heir and* fidei-commissary *according to their respective shares; and this is incident to the heir, by virtue of the civil law, and, to the* fidei-commissary, *by the* Trebellian *decree. But, when the written heir was requested by the testator to restore the whole inheritance, or more than three fourths, then the* Pegasian senatus-consultum *took place; for, if he had once taken upon himself the heirship voluntarily, he was obliged to sustain all charges; and this, whether he did, or did not, retain his fourth. But, when the heir retained a fourth part, the stipulations, called* partis et pro parte, *were entered into, as between a legatee in part and an heir; and, when the heir did not retain a fourth, then the stipulations, called* emptæ et venditæ hæreditatis, *were interposed. But, if the written fiduciary heir declined, suspecting loss from defect of assets, it was provided by the* Pegasian *decree, that the prætor at the instance of the* fidei-commissary, *might compel such heir to take upon himself the inheritance, and*

datur, et actiones hæreditariæ ei et in eum transferuntur, qui recipit hæreditatem; utroque senatus-consulto in hac specie concurrente.

then restore it; and that afterwards all actions should be brought by or against the fidei-commissary *only; as ordained by the* Trebellian *decree. And in this case stipulations are not necessary; for the heir, who restores the inheritance, is secured, and all hereditary actions are transferred to and against him, by whom it is received; there being, in this instance, a concurrence of both decrees.*

Pegasiani in Trebellianum transfusio.

§ VII. Sed, quia stipulationes ex senatus-consulto Pegasiano descendentes et ipsa antiquitati displicuerunt, et quibusdam casibus captiosas eas homo excelsi ingenii Papinianus appellat, et nobis in legibus magis simplicitas, quam difficultas, placet, ideò omnibus nobis suggestis tam similitudinibus, quam differentiis utriusque senatus-consulti, placuit, exploso senatus-consulto Pegasiano, quod postea supervenit, omnem auctoritatem Trebelliano senatus-consulto præstare, ut ex eo fidei-commissariæ hæreditates restituantur; sivè habeat hæres ex voluntate testatoris quartam, sivè plus, sivè minus, sivè nihil penitùs: ut tunc, quando vel nihil, vel minùs quartà, apud eum remanet, liceat ei vel quartam, vel quod ei deest, ex nostra auctoritate retinere, vel repetere solutum, quasi ex Trebelliano senatus-consulto pro ratà portione actionibus tam in hæredem, quam in fidei-commissarium, competentibus. Si verò totam hæ-

§ 7. *But, as the stipulations, which arose from the* Pegasian *decree, were displeasing even to the ancients, insomuch that* Papinian, *a man of sublime genius, considers them, in some cases, as captious; and, as we prefer simplicity to complexity in matters of law, it hath therefore pleased us, upon comparing the agreement and disagreement of each decree, to abrogate the* Pegasian, *which was subsequent to the* Trebellian, *and to transfer a greater authority to the* Trebellian *decree, by which all trust inheritances shall be restored for the future, whether the testator hath given by his will a fourth part of his estate to his written heir, or more, or less, or even nothing; so that, when nothing is given to the heir, or less than a fourth part, he may be permitted to retain a fourth, or as much as will complete the deficiency, by virtue of our authority: or to demand repayment of what he hath expended; all actions being divided between the heir and*

reditatem sponte restituerit, omnes hæreditariæ actiones fidei-commissario, et adversus eum, competant. Sed etiam id, quod præcipuum Pegasiani senatus-consulti fuerat, ut, quandò recusaret hæres scriptus sibi datam hæreditatem adire, necessitas ei imponeretur totam hæreditatem volenti fidei-commissario restituere, et omnes ad eum, et contra eum, transferre actiones; et hoc transposuimus ad senatus-consultum Trebellianum, ut ex hoc solo necessitas hæredi imponatur, si, ipso nolente adire, fidei-commissarius desideret restitui sibi hæreditatem, nullo nec damno nec commodo apud hæredem remanente.

the fidei-commissary *in a just proportion according to the* Trebellian *decree. But, should the heir spontaneously restore the whole inheritance, all actions must be brought either by or against the* fidei-commissary. *And, whereas it was the principal effect of the* Pegasian *decree, that, when a written heir had refused to accept an inheritance, he might be constrained to take it, and restore it, at the instance of the* fidei-commissary, *to whom, and against whom, all actions passed, we have transferred that power to the* Trebellian *decree; which is now the only law, compelling a fiduciary heir to enter upon the inheritance, when the* fidei-commissary *is desirous that it should be restored; and the heir, in this case, can neither receive profit, or suffer loss.*

De quibus hæredibus, et in quibus fidei-commissariis, supra dicta locum habeant.

§ VIII. Nihil autèm interest, utrum aliquis, ex asse hæres institutus, aut totam hæreditatem aut pro parte restituere rogatur; an, ex parte hæres institutus, aut totam eam partem, aut partem partis, restituere rogatur. Nam et hoc casu eadem observari præcipimus, quæ in totius hæreditatis restitutione diximus.

§ 8. *But it makes no difference, whether an heir, who is instituted to the whole inheritance, be requested (by the testator) to restore the whole or a part only, or whether being nominated but to a part, be requested to restore that entire part, or only a portion of it; for we have ordained, that the same rule shall be observed, as in case of restitution of the whole.*

De eo, quod hæres voluntate testatoris deducit, præcipitvè.

§ IX. Si quis, unâ aliquâ re deductâ sive præceptâ, quæ quartam continent, (velùti fundo vel aliâ re,) rogatus sit restituere hæreditatem,

§ 9. *If an heir be requested by a testator to give up an inheritance, after deducting some specific thing, amounting to a fourth, as a piece of*

simili modo ex Trebelliano senatusconsulto restitutio fiet, perindè ac si, quartâ parte retentâ, rogatus esset reliquam hæreditatem restituere. Sed illud interest, quod altero casu, id est, cum deductâ sivè præceptâ aliquâ re restituitur hæreditas, in solidum ex eo senatus-consulto actiones transferuntur, et res, quæ remanet apud hæredem, sinè ullo onere hæreditario apud eum remanet, quasi ex legato ei acquisita; altero vero casu, cum quartâ partè retentâ rogatus est hæres restituere hæreditatem, et restituit, scinduntur actiones; et pro dodrante quidem transferuntur ad fidei-commissarium, pro quadrante remanent apud hæredem. Quinetiam licet unâ aliquâ re deductâ aut præceptâ, restituere aliquis hæreditatem rogatus sit, in quâ maxima pars hæreditatis contineatur, æquè in solidum transferuntur actiones: et secum deliberare debet is cui restituitur hæreditas, an expediat sibi restitui. Eadem scilicèt interveniunt, et si duabus pluribusve rebus deductis præceptisve, restituere hæreditatem rogatus sit. Sed et, si certâ summâ deductâ præceptâve, quæ quartam vel etiam maximam partem hæreditatis continet, rogatus sit aliquis hæreditatem restituere, idem juris est. Quæ autem diximus de eo, qui ex asse institutus est, eadem transferimus

ground, &c. *he may be compelled to give it up by the* Trebellian *decree, in the same manner, as if he had been requested to restore the remainder of an inheritance, after reserving a fourth. But there is this difference, that, when an heir is requested to give up an inheritance, after deducting a particular thing, then all actions are transferred to the* fidei-commissary, *and what remains with the heir is free of incumbrance, as if acquired by legacy; but when an heir is requested in general terms to give up an inheritance, after retaining a fourth to himself, all actions are proportionably divided; those, which regard the three fourths of the estate, being transferred to the* fidei-commissary; *and those, which regard the single fourth, remaining for the benefit of the heir. And, even if an heir be requested to give up an inheritance, after making a deduction of some particular thing, which amounts to the value of the greatest part of it, all actions, both active and passive, are nevertheless transferred to the* fidei-commissary, *who ought always, therefore, to consider, whether it will be expedient or not, that the inheritance should be given up to him. So the law is, whether an heir be requested to give up an inheritance after a deduction of two, or more, spe-*

et ad eum, qui ex parte hæres scriptus est.

cific things, or of a certain sum of money, which exceeds in value the greatest part of the inheritance. Thus what we have said of an heir, who is instituted to the whole of an inheritance, holds equally of him, who is instituted only to a part.

De fidei-commissis ab intestato relictis.

§ X. Præterea intestatus quoque moriturus potest rogare eum, ad quem bona sua vel legitimo jure vel honorario pertinere intelligit, ut hæreditatem suam totam, partemve ejus, aut rem aliquam, velùti fundum, hominem, pecuniam, alicui restituat; cum alioquì, legata nisi ex testamento non valeant.

§ 10. *Moreover, a man about to die intestate, may request the person, whom he thinks will succeed him, either by the civil or prætorian law, to give up the whole inheritance, or a part of it, or any particular thing, as a piece of ground, a slave, a sum of money,* &c. *(But this regards trusts only;) for legacies are invalid, unless bequeathed by testament.*

De fidei-commisso relicto a fidei-commissario.

§ XI. Eum quoque, cui aliquid restituitur, potest rogare, ut id rursus alii, aut totum, aut partem, vel etiam aliquid, aliud restituat.

§ 11. *A* fidei-commissary *may also himself be requested to give up to another, either the whole, or a part, of what he receives; or some other thing in lieu of it.*

De probatione fidei-commissi.

§ XII. Et, quia prima fidei-commissorum cunabula à fide hæredum pendent, et tam nomen, quam substantiam, acceperunt, ideò D. Augustus ad necessitatem juris ea retraxit. Nuper et nos, eundem principem superare contendentes, ex facto, quod Tribonianus, vir excellentissimus, quæstor sacri palatii, suggessit, constitutionem fecimus, per quam disposuimus, si testator fidei hæredis sui commisit, ut vel hæreditatem vel speciale fidei-com-

§ 12. *All fiduciary bequests depended formerly upon the sole* faith *of the heir; whence they took as well their name as their essence. The emperor* Augustus *was the first, who brought them under judicial cognisance. But we have since endeavoured to exceed that prince; and, at the instance of that most excellent man* Tribonian, *the questor of our palace, we have enacted, that, if a testator hath trusted to the faith of his heir for the surrender of an in-*

missum restituat; et neque ex scriptura, neque ex quinque testium numero, qui in fidei-commissis legitimus esse noscitur, possit res manifestari, sed vel pauciores, vel nemo penitùs testis intervenerit; tunc, sivè pater hæredis, sivè alius quicunque sit, qui fidem hæredis elegerit, et ab eo restitui aliquid voluerit, si hæres perfidiâ tentus adimplere fidem recusat, negando rem ita esse subsecutam; si fidei-commissarius ei jusjurandum detulerit, cum prius ipse de calumniâ juraverit, necesse eum habere, vel jusjurandum subire, quod nihil tale à testatore audiverit, vel recusantem ad fidei-commissi vel universalis vel specialis solutionem coarctari; ne depereat ultima voluntas testatoris fidei hæredis commissa. Eadem observari censuimus, etsi a legatario vel fidei-commissario aliquid similitèr relictum sit. Quod si is, à, quo relictum dicitur, [postquam negaverit,] confiteatur quidem, aliquid à se relictum esse, sed ad legis subtilitatem recurrat, omninò solvere cogendus est.

heritance, or any particular thing, and this trust cannot be made manifest by the depositions of five witnesses, (which is known to be the legal number in such cases,) there having been not so many, or perhaps no witnesses present, the heir at the same time perfidiously refusing to make any payment, and denying the whole transaction, then the fidei-commissary, *having previously taken the oath of calumny, may put the heir, although he be the son of the testator, to his oath; and thus force him either to deny the trust upon oath, or comply with it, whether the trust be universal or particular; and this is allowed, lest the last will of a testator, committed to the faith of an heir, should be defeated. And we have granted the same remedy against a legatee, or even a* fidei-commissary, *to whom any thing hath been thus bequeathed. And, if he, to whom something hath been so left, should confess the trust, after having denied it, but endeavour at the same time to shelter himself under subtility of the law, he may nevertheless be compelled to perform his duty.*

TITULUS VIGESIMUS-QUARTUS.

DE SINGULIS REBUS PER FIDEI-COMMISSUM RELICTIS.

Summa.

POTEST tamen quis etiam singulas res per fidei-commissum relinquere; velûti fundum, argentum, hominem, vestem, et pecuniam numeratam; et vel ipsum hæredem rogare, ut alicui restituat; vel legatarium, quamvis è legatario legari non possit.

A man may also leave particular things in trust; as a field, silver, cloaths, or a certain sum of money; and may request either his heir to restore them, or even a legatee; although a legatee cannot be made chargeable with a legacy.

Quæ relinqui possunt.

§ I. Potest autem non solùm proprias res testator per fidei-commissum relinquere, sed et hæredis, aut legatarii, aut fidei-commissarii, aut cujuslibet alterius. Itaque et legatarius et fidei-commissarius non solùm de eâ re rogari potest, ut eam alicui restituat, quæ ei relicta sit; sed etiam de aliâ, sivè ipsius, sivè alienâ sit. Hoc solùm observandum est, ne plus quisquam rogetur alicui restituere, quam ipse ex testamento ceperit; nam, quod amplius est, inutilitèr, relinquitur. Cum autèm aliena res per fidei-commissum relinquitur, necesse est ei, qui rogatus est, aut ipsam rem redimere et præstare, aut æstimationem ejus solvere.

§ 1. A testator may leave in trust not only his own property, but also that of his heir, of a legatee, of a fidei-commissary, *or of any other: so that a legatee or* fidei-commissary *may not only be requested to give what hath been left to him, but what is his own, or even what is the property of another. The only caution necessary to be observed by the testator is, that no man be requested to give more, than he hath received under the will; for the excess will be ineffectually bequeathed. And, when the property of another is left in trust, the person, requested to restore it, is obliged either to obtain from the proprietor the very thing bequeathed, or to pay the value of it.*

De libertate.

§ II. Libertas quoque servo per fidei-commissum dari potest, ut hæ-

§ 2. Liberty may also be conferred upon a slave by virtue of a trust r

res eum rogetur manumittere, vel legatarius, vel fidei-commissarius; nec interest, utrùm de suo proprio servo testator roget, an de eo, qui ipsius hæredis, aut legatarii, vel etiam extranei sit: itaque et alienus servus redimi et manumitti debet. Quod si dominus eum non vendat, (si modò nihil ex judicio ejus, qui reliquit libertatem, perceperit,) non statim extinguitur fidei-commissaria libertas, sed differtur, quoad possit tempore procedente, ubicunque occasio servi redimendi fuerit, præstari libertas. Qui autèm ex fidei-commissi causâ manumittitur, non testatoris fit libertus, etiamsi testatoris servus sit, sed ejus, qui manumittit. At is, qui directò ex testamento liber esse jubetur, ipsius testatoris libertus fit; qui etiam Orcinus appellatur: nec alius ullus directò ex testamento libertatem habere potest, quam qui utroque tempore testatoris fuerit, et quo faceret testamentum, et quo moreretur. Directò autem libertas tunc dari videtur, cum non ab alio servum manumitti rogat, sed velut ex suo testamento libertatem ei competere vult.

for an heir, legatee, or fidei-commissary, *may be requested to manumit: nor does it signify whether the testator request the manumission of his own slave, of the slave of his heir, of a legatee, or of a stranger: and therefore, when a slave is not the testator's own property, he must be bought, if possible, and manumitted. But, if the proprietor of the slave refuse to sell him, (which he may do, if he hath taken nothing under the will of the testator,) yet the fiduciary bequest is not extinguished, but deferred only, till it can be conveniently performed. Note, that he, who is manumitted in consequence of a trust, does not become the freedman of the testator, although he was the testator's own slave, but he becomes the freedman of the manumittor: but a slave, to whom liberty is directly given by testament, becomes the freedman of the testator, and is called* Orcinus; *and no one can obtain liberty directly by testament, unless he were the slave of the testator, not only at the time of the testator's death, but also at the time of making his testament. And liberty is understood to be directly given, not when a testator requests, that freedom shall be given to his slave by another, but when he wills it to take place by virtue of his own testament.*

De verbis fidei-commissorum.

§ III. Verba autem fidei-commissorum hæc maximè in usu habentur; *peto, rogo, volo, mando, fidei tuæ committo:* quæ perindè sin-

§ 3. *The terms generally used in the commitment of trusts are the following:* I request, I ask, I desire, I commit, I confide: *any of them,*

gula firma sunt, atque si omnia in unum congesta essent.

singly taken, is as binding, as if all were joined.

TITULUS VIGESIMUS-QUINTUS.

DE CODICILLIS.

D. xxix. T. 7. C. vi. T. 36.

Codicillorum origo.

ANTE Augusti tempora constat, codicillorum jus in usu non fuisse: sed primus Lucius Lentulus, ex cujus personâ etiam fidei-commissa esse cœperunt, codicillos introduxit. Nam, cum decederet in Africa, scripsit codicillos testamento confirmatos, quibus ab Augusto petiit per fidei-commissum, ut faceret aliquid: et, cum D. Augustus voluntatem ejus implesset, deincèps reliqui, ejus auctoritatem secuti, fidei-commissa præstabant: et filia Lentuli, legata, quæ jure non debebat, solvit. Dicitur autem Augustus convocasse sapientes viros, interque eos Trebatium quoque, cujus tunc auctoritas maxima erat, et quæsisse, an posset recipi hoc, nec absonans à juris ratione codicillorum usus esset? et Trebatium suasisse Augusto, quod diceret, utilissimum et necessarium hoc civibus esse, propter magnas et longas peregrinationes, quæ apud veteres fuissent; ubi, si quis testamentum facere non posset, tamen codicillos posset. Post quæ tempora,

It is certain, that codicils were not in frequent use before the reign of Augustus: *for* Lucius Lentulus, *by whose means trusts became efficacious, was the first, who introduced codicils. When dying in Africa, he wrote several codicils, which were confirmed by his testament; and in these he requested* Augustus *to perform some particular act in consequence of a trust: the emperor complied with the request; and many other persons influenced by the emperor's example, executed trusts, committed to their charge; and the daughter of* Lentulus *paid debts, which in strictness of law were not due. But it is reported, that* Augustus, *having convened upon this occasion the sages of the law, among the rest* Trebatius, *whose opinion was of the greatest authority, demanded whether codicils could be admitted and whether they were not repugnant to the reason of the law? to which* Trebatius *answered, that codicils were most convenient, and necessary on account of the great*

cum et Labeo codicillos fecisset, jam nemini dubium erat, quin codicilli jure optimo admitterentur.

and long journies, which the Romans *were frequently obliged to take, so that, where a man could not make a testament, he might bequeath his effects by codicil. Afterwards, when* Labeo, *(a lawyer of great eminence,) disposed of his own property by codicil, it was no longer a doubt, but that codicils might be legally allowed.*

Codicilli fieri possunt vel antè, vel post, testamentum, imò etiam ab intestato.

§ I. Non tantùm autem testamento facto potest quis codicillos facere, sed et intestatus quis decendens fidei-committere codicillis potest. Sed, cum antè testamentum factum codicilli facti erant, Papinianus ait, non alitèr vires habere, quam si speciali voluntate postèa confirmentur. Sed Divi Severus et Antoninus rescripserunt, ex iis codicillis, qui testamentum præcedunt, posse fidei-commissum peti, si appareat eum, qui testamentum fecit, à voluntate, quam in codicillis expresserat, non recessisse.

§ 1. *Not only one who hath already made his will, may make a codicil, but even an intestate may raise a trust by codicil: yet, when a codicil is antecedent to a testament, it cannot take effect according to* Papinian, *unless confirmed by the subsequent testament. But the emperors* Severus *and* Antoninus *have by rescript declared, that a thing, left in trust in a codicil preceding a testament, may be demanded by the* fidei-commissary, *if it appear, that the testator hath not receded from the intention, which he at first expressed in his codicil.*

Codicillis hæreditatis directo dari non potest.

§ II. Codicillis autem hæreditas neque dari, neque adimi, potest; ne confundatur jus testamentorum et codicillorum: et ideò nec exhæredatio scribi. Directò autem hæreditas codicillis neque dari neque adimi potest: nam per fidei-commissum hæreditas codicillis jure relinquitur. Nec conditionem hæredi instituto codicillis adjicere,

§ 2. *An inheritance can neither be given nor taken away by codicil, lest the different operations of testaments and codicils be confounded: of course, no heir can be disinherited by codicil. But although an inheritance can neither be given nor taken away by codicil, in* direct *terms, yet it may be legally left from the heir in a codicil, by means of a (trust or)*

neque substituere directò, quis potest.

fidei-commissum. *No man may impose a condition upon his heir by codicil, or substitute* directly.

De numero et solemnitate.

§ III. Codicillos autem etiam plures quis facere potest: et nullam solemnitatem ordinationis desiderant.

§ 3. *A man may make many codicils, and they require no solemnity.*

FINIS LIBRI SECUNDI.

DIVI JUSTINIANI

INSTITUTIONUM

LIBER TERTIUS.

TITULUS PRIMUS.

DE HÆREDITATIBUS, QUÆ AB INTESTATO DEFERUNTUR.

D. xxxviii. T. 16. C. vi. T. 55 et 58. Nov. 118.

Definitio intestati.

INTESTATUS decedit, qui aut omninò testamentum non fecit, aut non jure fecit; aut id, quod fecerat, ruptum irritumve factum est; aut si ex eo nemo hæres extiterit.

A man dies intestate, who hath either not made a testament; or not made one in due form of law; or if his testament, though rightly made, be cancelled, or broken; or if no one will become heir under it.

Primus ordo succedentium ab intestato.

§ I. Intestatorum autèm hæreditates ex lege duodecim tabularum primùm ad suos hæredes pertinent.

§ 1. *The inheritances of intestates, by the law of the twelve tables, belong, in the first place, to the* sui hæredes, i. e. *to the proper or domestic heirs of such intestates.*

Qui sunt sui hæredes.

§ II. Sui autem hæredes existimantur, (ut supra diximus,) qui in potestate morientis fuerint; veluti filius filiave, nepos neptisve ex filio, pronepos, proneptisve ex nepote, ex filio nato prognatus prognatave: nec interest, utrùm naturales sint liberi, an adoptivi. Quibus connu-

§ 2. *And, as we have observed before, those are* sui hæredes *or proper heirs, who, at the death of the deceased, were under his power; as a son or a daughter, a grandson or a grand-daughter by a son, a great-grandson or great-grand-daughter by a grandson of a son,* &c. *Neither*

merari necesse est etiam eos, qui ex legitimis quidem nuptiis vel matrimoniis non sunt progeniti, curiis tamen civitatum dati, secundùm Divalium constitutionem, quæ super his positæ sunt, tenorem, heredum suorum jura nanciscuntur: nec non eos, quos nostræ amplexæ sunt constitutiones, per quas jussimus, si quis mulierem in suo contubernio copulaverit, non ab initio affectione maritali, eam tamen, cum quâ poterat habere conjugium, et ex eâ liberos sustulerit, postea verò, affectione procedente etiam nuptialia instrumenta cum ea fecerit, et filios vel filias habuerit, non solùm eos liberos, qui post dotem editi sunt, justos et in potestate patris esse; sed etiam anteriores, qui et iis, qui postea nati sunt, occasionem legitimi nominis præstiterunt: quod obtinere censuimus, etsi non progeniti fuerint post dotale instrumentum confectum liberi, vel etiam nati ab hac luce fuerint subtracti. Ita demùm tamen nepos neptisve, pronepos proneptisve, suorum hæredum numero sunt, si præcedens persona desierit in potestate parentis esse, sivè morte id acciderit, sivè aliâ ratione, veluti emancipatione. Nam, si per id tempus, quo quis moritur, filius in potestate ejus sit, nepos ex eo suus hæres esse non potest: idque et in cæteris liberorum personis dictum intelligimus. Posthumi quoque, qui, si vivo patre

is it material, whether these children be natural or adopted. But, among natural children, we must reckon those, who, though not born in lawful wedlock, are nevertheless, according to the tenor of the imperial constitutions, entitled to the rights of proper heirs, by being admitted Decurions. Those also are comprized within our own constitutions, which enact that, if any person shall keep a woman with whom he is not prohibited to marry, and have children by her, and shall afterwards, through affection, marry that woman, and have by her sons or daughters, not only these latter shall be legitimate and in the power of their father, but also the former, who gave occasion to the legitimacy of the children born afterwards. And this law shall obtain as to children born before marriage; although the children, born subsequent to it, are dead or none such are born. But a grandson or grand-daughter, a great-grandson or great-grand-daughter, is not reckoned in the number of proper heirs, unless the person preceding them in degree hath ceased to be under paternal power, either by death or some other means, as by emancipation: for, if a son, when his father died, was under the power of his father, the grandson can not be the proper heir of his grand-father; and by parity of reasoning, this rule is understood to take place in relation

tre nati essent, in potestate ejus futuri forent, sui hæredes sunt.

to all descendants in the right line. But all posthumous children, who would have been under the power of their father, if they had been born in his life-time, are esteemed sui hæredes, *or proper heirs.*

Quomodo sui hæredes fiunt.

§ III. Sui autem hæredes fiunt etiam ignorantes, et, licèt furiosi, sint, hæredes possunt existere: quia, quibus ex causis ignorantibus nobis acquiritur, ex his causis et furiosis acquiri potest. Et statim à morte parentis quasi continuatur dominium; et ideò nec tutoris auctoritate opus est pupillis, cum etiam ignorantibus acquiratur suis hæredibus hæreditas: nec curatoris assensu acquiritur furioso, sed ipso jure.

§ 3. *Persons may become proper heirs, without their knowledge, even though insane; for by whatever means inheritances may be acquired without our knowledge, by the same means they may be acquired by persons insane. The dominion of an inheritance is continued in the heir from the instant of the death of his ancestor; nor is the authority of a tutor necessary, because inheritances may be acquired by proper heirs, without their knowledge: neither does a disordered person inherit by assent of his curator, but by operation of law.*

De filio, post mortem patris, ab hostibus reverso.

§ IV. Interdùm autèm, licèt in potestate parentis mortis tempore suus hæres non fuerit, tamèn suus hæres parenti efficitur: veluti si ab hostibus quis reversus fuerit post mortem patris sui: jus enim postliminii hoc facit.

§ 4. *But sometimes a child becomes a proper heir, although he was not under power at the death of his parent; as when a person returns from captivity after the death of his father: the* jus postliminii, *or right of return, effects this.*

De memorià patris damnatà ob crimen perduellionis.

§ V. Per contrarium autèm hoc evenit, ut, licèt quis in familiâ defuncti sit mortis tempore, tamen suus hæres non fiat; veluti si post mortem suam pater judicatus fuerit perduellionis reus, ac per hoc me-

§ 5. *On the contrary, it may happen, that a child, who, at the death of his parent, was under his power, shall not be his proper heir: as when a parent, after his decease, is adjudged to have been guilty of le-*

moria ejus damnata fuerit; suum enim hæredem habere non potest, cum fiscus ei succedat: sed potest dici, ipso quidem jure suum hæredem esse, sed desinere.

se-majesty, whereby his memory is rendered infamous, and he can have no proper heir, all his possessions becoming forfeited to the treasury. But a son, in this case, may be said to have been *the proper heir of his father, and afterwards to have ceased to be so.*

De divisione hæreditatis inter suos hæredes.

§ VI. Cum filius filiave et ex altero filio nepos neptisve existunt, paritèr ad hæreditatem avi vocantur, nec, qui gradu proximior est, ulteriorem excludit: æquum enim esse videtur, nepotes neptesve in patris sui locum succedere. Pari ratione et si nepos neptisve sit ex filio, et ex nepote pronepos proneptisve, simùl vocantur. Et, quia placuit, nepotes neptesve, item pronepotes proneptesve, in parentis sui locum succedere, conveniens esse visum est, non in capita, sed in stirpes, hæreditatem dividi; ut filius partem dimidiam hæreditatis habeat, et ex altero filio duo pluresve nepotes alteram dimidiam. Itèm, si ex duobus filiis, nepotes neptesve existant, ex altero unus aut duo fortè, ex altero tres aut quatuor, ad unum aut duos dimidia pars pertineat, ad tres vel quatuor altera dimidia.

§ 6. *A son, a daughter, and a grandson or grand-daughter by another son, are called equally to the inheritance; nor does the nearest exclude the more remote; for it seems just, that grandsons and grand-daughters should succeed in the place of their father. By like reason, a grandson or grand-daughter by a son, and a great-grandson or great-grand-daughter by a grandson, are all called together. And since grandsons and grand-daughters, great-grandsons and great-grand-daughters, succeed in place of their parent, it seemed convenient, that inheritances should not be divided into* capita, *but into* stirpes: *so that a son, should possess one half, and the grand-children,* (*however numerous*) *of another son, the other half of an inheritance. So, where there are grand-children by two sons, the one son leaving one or two children, and the other three or four, the inheritance must belong, half to the grand-child, or the two grand-children by the one son, and half to the three or four grand-children by the other son.*

Quo tempore suitas spectatur.

§ VII. Cum autem quæritur, an quis suus hæres existere possit, eo tempore quærendum est, quo certum est, aliquem sinè testamento decessisse; quod accidit et destituto testamento. Hac ratione, si filius exhæredatus fuerit et extraneus hæres institutus, et, filio mortuo, postea certum fuerit, hæredem institutum ex testamento non fieri hæredem, aut quia noluit esse hæres, aut quia non potuit, nepos avo suus hæres existet: quia, quo tempore certum est, intestatum decessisse patrem-familias, solus invenitur nepos: et hoc certum est.

§ 7. *When it is asked, is such a man a proper heir? we must inquire at what time it was certain, that the deceased died without a testament; which happens, if his testament be relinquished. Thus, if a son be disinherited and a stranger instituted heir, and, after the death of the son, it becomes certain, that the instituted heir was not in fact the heir, either because he was unwilling, or unable, to accept the inheritance, in this case, the grandson of the deceased becomes the proper heir of his grandfather: for at the time, when it was certain, that the deceased died intestate, there was no other heir, but the grand-child; and this is evident.*

De nata post mortem avi, vel adoptato à filio emancipato.

§ VIII. Et, licèt post mortem avi natus sit, tamèn avo vivo conceptus, mortuo patre ejus, posteaque deserto avi testamento, suus hæres efficitur. Planè, si et conceptus et natus fuerit post mortem avi, mortuo patre suo, desertoque postea avi testamento, suus hæres avo non existet; quia nullo jure cognationis patrem sui patris attigit: sed nec ille est inter liberos avi, quem filius emancipatus adoptavit. Hi autem, cum non sint, sui (quantum ad hæreditatem,) liberi, neque bonorum possessionem petere

§ 8. *And although a child be born after the death of his grandfather, yet, if he were conceived in the lifetime of his grandfather, he will, at the death of his father and after his grandfather's testament is deserted by the instituted heir, become the proper heir of his grandfather. But a child both conceived and born after the death of his grandfather, could not become the proper heir, although his father should die and the testament of his grandfather be deserted; because he was never allied to his grandfather by any tie of cognation:*

possunt, quasi proximi cognati. Hæc de suis hæredibus.

neither is the adopted son of an emancipated son, to be reckoned among the children of his adoptive father's father. So that the adopted children of an emancipated son, can neither become the proper heirs of their father's father in regard to the inheritance, nor demand the possession of goods as next of kin. Thus much concerning proper heirs.

De liberis emancipatis.

§ IX. Emancipati autem liberi jure civili nihil juris habent: neque enim sui hæredes sunt, qui in potestate morientis esse desierunt, neque ullo alio jure per legem duodecim tabularum vocantur. Sed prætor, naturali æquitate motus, dat eis bonorum possessionem *unde liberi*, perindè ac si in potestate parentis tempore mortis fuissent; sivè soli sint, sivè cum suis hæredibus concurrant. Itaque, duobus liberis existentibus, emancipato uno, et eo, qui tempore mortis in potestate fuerit, sanè quidem is, qui in potestate fuit, solus jure civili hæres est, et solus suus hæres; sed, cum emancipatus, beneficio prætoris, in partem admittitur, evenit, ut suus hæres pro parte hæres fiat.

§ 9. *Emancipated children by the civil law have no right to the inheritances of their parents: for those are not proper heirs, who have ceased to be under the power of their parent deceased, before his death, neither are they called to inherit by any other right according to the law of the twelve tables. But the prætor, induced by natural equity, grants them possession of goods, by the edict beginning*, unde liberi, *as fully, as if they had been under power at the death of their parent; and this, whether they be sole, or mixed with others, who are* proper heirs: *therefore, when there are two sons, one emancipated, and the other under power at his father's death, the latter, by the civil law, is alone the heir, and alone the proper heir: but, when the emancipated son, by the indulgence of the prætor, is admitted to his share, then the proper heir becomes the heir only of his own moiety.*

Si emancipatus se dederit in adoptionem.

§ X. At hi, qui emancipati à parente in adoptionem se dederunt,

§ 10. *But they, who after emancipation have given themselves in*

non admittuntur ad bona naturalis patris quasi liberi, si modò, cum is moreretur, in adoptiva familia fuerint: nam vivo eo emancipati ab adoptivo patre perindè admittuntur ad bona naturalis patris, ac si emancipati ab ipso essent, nec unquam in adoptivi familia fuissent: et convenientèr, quod adoptivum patrem pertinet, extraneorum loco esse incipiunt. Post mortem verò naturalis patris emancipati ab adoptivo patre, et, quantùm ad hunc adoptivum patrem pertinet, æque extraneorum loco fiunt, et, quantùm ad naturalis patris bona pertinet, nihilò magis liberorum gradum nanciscuntur. Quod ideò sic placuit, quia iniquum erat, esse in potestate patris adoptivi, ad quos bona naturalis patris pertineant, utrum ad liberos ejus, an ad agnatos.

adoption, are not admitted, as children, to the possession of the effects of their natural father, if, at the time of his death, they were in the adoptive family. But, if in the lifetime of their natural father, they were emancipated by their adoptive father, they are then admitted (by the prætor) to take the goods of their natural father, as if they had been emancipated by him, and had never entered into the family of the adoptor: consequently, in regard to their adoptive father, they are looked upon as mere strangers. But those, who are emancipated by their adoptive father, after the death of their natural father, are nevertheless reputed strangers to their adoptive father; and, in regard to the inheritance of their natural father, they are not at all the more intitled to reassume the rank of children. These rules of law have been established, inasmuch as it was unjust, that it should be in the power of an adoptor to determine at his pleasure, to whom the inheritance of a natural father should appertain, whether to his children, or to his agnates.

Collatio filiorum naturalium et adoptivorum.

§ XI. Minùs ergo juris habent adoptivi filii, quam naturales: namque naturales emancipati, beneficio prætoris gradum liberorum retinent, licèt jure civili perdant. Adoptivi verò emancipati et jure civili perdunt gradum liberorum, et à prætore non admittuntur; et rectè. Naturalia enim jura civilis ratio perimere non potest; nec, quia

§ 11. *Adopted children have therefore fewer rights and privileges, than natural children; who, even after emancipation, retain the rank of children by the indulgence of the prætor, although they lose it by the civil law: but adopted children, when emancipated, lose the rank of children by the civil law, and are denied admittance into the rank of chil-*

desinunt sui hæredes esse, possunt desinere filii filiave, nepotes neptesve esse. Adoptivi verò emancipati extraneorum loco incipiunt esse; quia jus nomenque filii filiæve, quod per adoptionem consecuti sunt, aliâ civili ratione, id est, emancipatione, perdunt.

dren by the prætor; and properly: for civil policy can not destroy natural rights; nor can natural children ever cease to be sons and daughters, grandsons and grand-daughters, although they may cease to be proper heirs: but adopted children, when emancipated, become instantly strangers; for the right and name of son or daughter, obtained by the civil right of adoption, may be destroyed by the civil right of emancipation.

De bonorum possessione contra tabulas.

§ XII. Eadem hæc observantur et in eâ bonorum possessione, quam contra tabulas testamenti parentis liberis præteritis, id est, neque hæredibus institutis, neque, ut oportet, exhæredatis, prætor pollicetur. Nam eos quidem, qui in potestate, mortis tempore fuerint, et emancipatos, vocat prætor ad eandem bonorum possessionem; eos verò, qui in adoptivâ familiâ fuerint per hoc tempus, quo naturalis parens moreretur, repellit. Item adoptivos liberos, emancipatos ab adoptivo patre, sicùt nec ab intestato, ita longè minùs contra tabulas testamenti, ad bona ejus admittit; quia desinunt in numero liberorum ejus esse.

§ 12. *The same rules are observed as to that possession of goods, which the prætor, contrary to the testament of the parent, grants to children, not mentioned therein: that is, who are neither instituted heirs, nor properly disinherited. For the prætor calls those, who were under power at the death of their parents, and those also, who are emancipated, to the same possession of goods; but he repels those, who were in an adoptive family at the decease of their natural parents. And, as the prætor admits not such adopted children, as have been emancipated by their adoptive father, to succeed him* ab intestato, *much less does he admit such children to possess the goods of their adoptive father contrary to his testament; for, by emancipation, they cease to be in the number of his children.*

Unde cognati.

§ XIII. Admonendi tamen sumus, eos, qui in alienâ familia sunt,

§ 13. *We must nevertheless observe, that, although those, who*

quivè post mortem naturalis parentis ab adoptivo patre emancipati fuerint, intestato parente naturali mortuo, licet eâ parte edicti, quâ liberi ad bonorum possessionem vocantur, non admittantur, aliâ tamen parte vocari, scilicèt, quâ cognati defuncti vocantur. Ex quâ ita admittuntur, si neque sui hæredes liberi, neque emancipati obstent, neque agnatus quidem ullus interveniat. Antè enim prætor liberos vocat, tam suos hæredes quam emancipatos, deinde legitimos hæredes, tertio proximos cognatas.

were in an adoptive family, but have been emancipated by their adoptive father, after the decease of their natural father, dying intestate, are not admitted by that part of the edict, by which children are called to the possession of goods, yet they are admitted by another part, by which the cognates *of the deceased are called to the possession of his effects. But, by this last-named part of the edict, the* cognates *are only called when there is no opposition from* proper heirs, *emancipated children, or* agnates: *for the prætor first calls the* proper heirs *with the emancipated children, then the* agnates, *and lastly the nearest* cognates.

Emendatio juris antiqui. De adoptivis.

§ XIV. Sed ea omnia antiquitati placuerunt: aliquam autèm emendationem à nostrâ constitutione acceperunt, quam super iis personis exposuimus, quæ à patribus suis naturalibus in adoptionem aliis dantur: invenimus etenim nonnullos casus, in quibus filii et naturalium successionem propter adoptionem amittebant, et adoptione facilè per emancipationem solutâ, ad neutrius patris successionem vocabantur. Hoc, solito more, corrigentes, constitutionem scripsimus, per quam definimus, quandò parens naturalis filium suum adoptandum alii dederit, integra omnia jure ita servari, atque si in patris naturalis potestate permansisset, nec penitùs adoptio fuisset subsecuta; nisi in hoc tantummodò casu, ut possit ab in-

§ 14. *Such were the rules that formerly obtained; but they have received some emendation from our constitution, relating to persons given in adoption by their natural parents: for we have remarked instances of sons, who by adoption have lost their succession to their natural parents, and who, by the ease with which adoption is dissolved by emancipation, have also lost the right of succeeding to their adoptive parents. We therefore, as usual, correcting what is amiss, have enacted that, when a natural father hath given his son in adoption, the rights of the son shall be preserved intire, as though he had still remained under the power of his natural father, and there had been no adoption; except only, that the person adopted may succeed to his*

testato ad patris adoptivi venire successionem. Testamento autem ab eo facto, neque jure civili, neque prætori, ex hæreditate ejus aliquid persequi potest, neque contra tabulas bonorum possessione agnitâ, neque inofficiosi querelâ institutâ; cum nec necessitas patri adoptivo imponatur, vel hæredem eum instituere, vel exhæredem facere, utpote nullo vinculo naturali copulatum; neque si ex Sabiniano senatus-consulto ex tribus maribus fuerit adoptatus: nam, et in ejusmodi casu, neque quarta ei servatur, neque ulla actio ad ejus persecutionem ei competit. Nostrâ autem constitutione exceptus est is, quem parens naturalis adoptandum susceperit. Utroque enim jure, tam naturali quam legitimo, in hanc personam concurrente, pristina jura tali adoptioni servamus; quemadmodùm si pater-familias sese dederit arrogandum: quæ specialitèr et singulatim ex præfatæ constitutionis tenore possunt colligi.

adoptor, if he die intestate. But, if the adoptor make a will and omit to name his adopted son, such son can neither by the civil nor the prætorian law obtain any part of the inheritance, whether he demand possession of the effects, contra tabulas, *(contrary to the letter of the testament,) or alledge that the testament is inofficious: for an adoptor is under no obligation to institute, or disinherit his adopted son, there being no natural tie between them. Nor can the adopted person, claim under the* Sabinian senatus-consultum, *by being one of three sons: for in this case he can neither obtain the fourth part of his adoptive father's effects, nor be intitled to any action upon that account. But persons adopted by their natural parents, (*i. e. *by a grand-father or great-grand-father,* &c.*) are excepted in our constitution: for, as such persons are united together by the concurrence both of natural and civil rights, we have thought proper to retain the old law in relation to those adoptions; in the same manner, as when the father of a family hath given himself in arrogation. But all this, may be collected from the tenor of the above-mentioned constitution.*

De descentibus ex fœminis.

§ XV. Item vetustas, ex masculis progenitos plus diligens, solos nepotes vel neptes, qui quæve ex virili sexu descendunt, ad suorum vocabat successionem, et jure agnatorum eos anteponebat; nepotes

§ 15. *The ancient law, preferring descendants from males, called only grand-children so descended, to the succession as proper heirs, by right of agnation; reputing grand-children born of daughters, and*

autem, qui ex filiabus nati sunt, et pronepotes, qui ex neptibus, cognatorum loco connumerans, post agnatorum lineam eos vocabat, tam in avi vel proavi materni, quam in aviæ vel proaviæ, sivè paternæ sivè maternæ, successionem. Divi autèm principes non passi sunt talem contra naturam injuriam sinè competenti emendatione relinquere: sed, cum nepotis et pronepotis nomen commune sit utrisque, tam qui ex masculis, quam qui ex fœminis descendunt, ideò eundem gradum et ordinem successionis eis donaverunt. Sed, ut ampliùs aliquid sit eis, qui non solùm naturæ, sed etiam veteris juris, suffragiis muniuntur, portionem nepotum vel neptum, vel deinceps, (de quibus supra diximus) paulò minuendam esse existimaverunt; ut minus tertiâ parte acciperent, quam mater eorum, vel avia, fuerat acceptura, vel pater eorum vel avus, paternus sivè maternus, quando fœmina mortua sit, cujus de hæreditate agitur; iisque, licèt soli sint, adeuntibus, agnatos minimè vocabant. Et, quemadmodùm lex duodecim tabularum, filio mortuo, nepotes, vel neptes, pronepotes vel proneptes, in locum patris sui ad successionem avi sui vocat; ita et principalis dispositio in locum matris suæ vel aviæ eos, cum jam designatâ partis tertiæ diminutione, vocat. Sed nos, cum adhuc dubitatio maneret inter agnatos et memoratos nepotes, quartam partem substantiæ defuncti agnatis sibi vin-

great-grand-children born of granddaughters, to be cognates, *and prohibiting them from succeeding to their grand-father and great-grandfather, maternal or paternal, until after the line of* agnati *was exhausted. But the emperors* Valentinian, Theodosius *and* Arcadius, *would not continue such a violence against nature; and, inasmuch as the name of grand-child and great-grandchild, is common, as well to descendants by females, as by males, they granted an equal right of succession in either case. But, to the end, that those persons who have been favoured by nature, as well as by the suffrage of antiquity, might enjoy some peculiar privileges, they thought it right, that the portions of grandchildren, great-grand-children, and other lineal descendants of a female, should be somewhat diminished, and therefore they have not permitted such persons to receive so much by a third part, as their mother or grandmother would have received; or their father or grand-father, paternal or maternal, at the decease of a female; for we now treat of inheritances, derived from a female; and, although there were only grandchildren by a female to take an inheritance, yet the emperors did not call the* agnates *to the succession. And as, upon the decease of a son, the law of the twelve tables calls the grand-children, and great-grandchildren, male and female, to represent their father as to the succession of their grand-father, so the impe-*

dicantibus ex cujusdam constitutionis auctoritate, memoratam quidem constitutionem à nostro codice segregavimus, neque inseri eam ex Theodosiano codice in eo concessimus. Nostrâ autem constitutione promulgatâ, toti juri ejus derogatum èst: et sanximus, talibus nepotibus ex filiâ, vel pronepotibus ex nepte, vel deincèps superstitibus, agnatos nullam partem mortui successionis sibi vindicare; ne hi, qui ex transversâ lineâ veniunt, potiores his habeantur, qui recto jure descendunt. Quam constitutionem nostram obtinere secundùm sui vigorem et tempora et nunc sancimus: ita tamen ut, quemadmodùm inter filios et nepotes ex filio antiquitas statuit, non in capita, sed in stirpes, dividi hæreditatem, similitèr nos, inter filios et nepotes ex filiâ, distributionem fieri jubeamus, vel inter omnes nepotes et neptes, et inter pronepotes vel proneptes, et alias deinceps, personas; ut utraque progenies matris vel patris, aviæ vel avi, portionem sine ullâ diminutione consequatur: ut, si fortè unus vel duo ex unâ parte, ex alterâ tres aut quatuor, extent unus aut duo dimidiam,

rial ordinance calls them to succession in the place of their mother or grand-mother, with the before-regulated diminution of a third part of their share. But, as there still remained matter of dispute between the agnati *and the above named grand-children, the* agnati *claiming the fourth part of the estate of the deceased by virtue of a certain constitution, we have therefore not permitted it to be inserted into* our *code from that of* Theodosius. *And further, we have altered the old law by enacting that* agnates *shall not be entitled to any part of the goods of the deceased, while grand-children born of a daughter, or great-grand-children born of a grand-daughter, or any other descendants from a female in the right line, are living; lest those, who proceed from the transverse line, should be preferred to lineal descendants. And we now decree, that this our ordinance shall obtain according to its full tenor. But as the old law ordered, that every inheritance should be divided in* stirpes, *and not in* capita, *between the son of the deceased and his grandsons by a son, so we also ordain, that similar distribution shall be*

alteri tres aut quatuor alteram dimidiam, hæreditatis habeant.

made between sons and grand-sons by a daughter, and between grand-sons and grand-daughters, great-grandsons and great-grand-daughters, and all other descendants in a right line; so that the issue, either of a mother or a father, or of a grand-mother or a grand-father, may obtain their portions without any diminution; and, if on the one part there should be one or two claimants, and on the other part three or four, that the greater number shall be intitled to one half, and the less number to the other half of the inheritance.

TITULUS SECUNDUS.

DE LEGITIMA AGNATORUM SUCCESSIONE.

D. xxxviii. T. 16. C. vi. T. 58.

Secundus ordo hæredum legitimorum.

SI nemo suus hæres, vel eorum, quos inter suos hæredes prætor vel constitutiones vocant, existat, qui successionem quoquo modo amplectatur, tunc ex lege duodecim tabularum ad agnatum proximum pertinet hæreditas.

When there is no proper heir nor any person, whom the prætor or the constitutions would call to inherit with proper heirs, then the inheritance, by a law of the twelve tables, appertains to the nearest agnate.

De agnatis naturalibus.

§ I. Sunt autèm agnati (ut primo quoque libro tradidimus) cognati per virilis sexùs personas cognatione conjuncti, quasi à patre connati. Itaque ex eodem patre nati

§ 1. Agnates, *as we have observed in the first book, are those, who are related or cognated by males,* (quasi à patre cognati:) *and therefore brothers, who are the sons of*

fratres, agnati sibi sunt; qui et consanguinei vocantur: nec requiritur, an etiam eandem matrem habuerint. Item patruus fratris filio, et invicèm is illi, agnatus est. Eodem numero sunt fratres patrueles, id est, qui ex duobus fratribus procreati sunt, qui etiam consobrini vocantur. Quâ ratione etiam ad plures gradus agnationis pervenire poterimus. Ii etiam, qui post mortem patris nascuntur, jura consanguinitatis nanciscuntur. Non tamen omnibus simul agnatis dat lex hæreditatem; sed iis, qui tunc proximiore gradu sunt, cum certum esse cœperit, aliquem intestatum decessisse.

the same father, are agnates *in regard to each other; they are also* consanguinei, *of the same blood; but it is not required, that they should have the same mother. An uncle is also agnate to his brother's son, and* vice versâ *the brother's son to his paternal uncle: and* brothers patruel, *that is, the children of brothers, who are also called* consobrini, *cousins are likewise reckoned* agnates. *Thus we may enumerate many degrees of agnation; and even those, who are born, after the decease of their parents, obtain the rights of consanguinity: the law nevertheless does not grant the right of inheritance to all the* agnati, *but to those only, who are in the nearest degree, when it becomes certain, that the deceased hath died intestate.*

De adoptivis.

§ II. Per adoptionem quoque agnationis jus consistit; veluti inter filios naturales et eos, quos pater eorum adoptavit; nec dubium est, quin ii impropriè consanguinei appellentur. Itèm, si quis ex cæteris agnatis tuis, veluti frater aut patruus, aut denique is, qui longiore gradu est, adoptaverit aliquem, agnatus inter tuos esse non dubitatur.

§ 2. *The right of agnation arises also through adoption; thus the natural and adopted sons of the same father are* agnates; *but such persons are without doubt improperly called* consanguinei. *Also, if a brother, a paternal uncle, or any other of your more remote agnates, should adopt, then the person so adopted, is undoubtedly to be reckoned among your* agnati.

De masculis et fœminis.

§ III. Cæterùm inter masculos quidem agnationis jure hæreditas, etiamsi longissimo gradu sint, ultro citroque capitur. Quod ad fœ-

§ 3. *Succession among males even in the most distant degree proceeds according to the right of agnation. But it hath been thought right*

minas verò attinet, ita placebat, ut ipsæ consanguinitatis jure, tantùm capiant hæreditatem, si sorores sint; ulterius non capiant. Masculi autem ad earum hæreditates, (etiamsi longissimo gradu sint,) admittantur. Quâ de causâ fratris tui, aut patrui tui filiæ, vel amitæ tuæ, hæreditas ad te pertinebat: tua verò ad illas non pertinebat. Quod ideò ita constitutum erat, quia commodius videbatur, ita jura constitui, ut plerùmque hæreditates ad masculos confluerent. Sed, quia sanè iniquum erat, in universum eas quasi extraneas repelli, prætor eas ad bonorum possessionem admittit eâ parte, qua proximitatis nomine bonorum possessionem pollicetur: ex quâ parte ita scilicèt admittuntur, si neque agnatus ullus, neque proximior cognatus, interveniat. Et hæc quidem lex duodecim tabularum nullo modo introduxit; sed, simplicitatem legibus amicam amplexa, simili modo omnes agnatos, sivè masculos sivè fœminas, cujuscunque gradus, ad similitudinem suorum, invicem ad successionem vocabat. Media autem jurisprudentia, quæ erat quidem lege duodecim tabularum junior, imperiali autem dispositione anterior, subtilitate quâdam excogitatâ, præfatam differentiam inducebat, et penitùs eas à successione agnatorum repellebat, omni aliâ successione incognitâ donec prætores paulatim asperitatem juris civilis corrigentes, sivè, quod deerat, implentes huma-

that females should only inherit by consanguinity, if sisters; and not in a more remote degree; though males might be admitted in the most distant degree to inherit females: thus in case of death, the inheritance of your brother's daughter, or of the daughter of your paternal uncle or aunt, would appertain to you; but your inheritance would not appertain to them. And this was so constituted, because it seemed expedient for the benefit of society, that inheritances should for the most part fall into the possession of males. But, as it was unjust, that females should be thus almost wholly excluded as strangers, the prætor admitted them to the possession of goods in that part of his edict, in which he gives the possession of goods on account of proximity: yet they are only admitted upon condition, that there is no agnate, *or nearer* cognate. *But the law of the twelve tables did not introduce these dispositions; for that law, according to the plainness and simplicity, which are agreeable to all laws, called the* agnates *of either sex, or any degree, to succession, in the same manner as it admitted* proper *heirs. But the middle law, which was posterior to the law of the twelve tables, and prior to the imperial constitutions, subtilly introduced the before-mentioned distinction, and entirely repelled females from the succession of* agnates, *no other method of succession being known, until the prætors, correcting by de-*

no proposito alium ordinem suis edictis addiderunt; et cognationis linea, proximitatis nomine introducta, per bonorum possessionem eas adjuvabant, et pollicebantur his bonorum possessionem, quæ *unde cognati* appellatur. Nos verò, legem duodecim tabularum sequentes, et ejus vestigia hac in parte conservantes, laudamus quidem prætores suæ humanitatis, non tamèn eos in plenum huic causæ mederi invenimus. Quarè etenim, uno eodemque gradu naturali concurrente, et agnationis titulis tam in masculis quam in fœminis æqua lance constitutis, masculis quidem debatur ad successionem venire omnium agnatorum, ex agnatis autem mulieribus nulli penitùs, nisi soli sorori, ad agnatorum successionem patebat aditus? Ideò nos, in plenum omnia reducentes, et ad jus duodecim tabularum eandem dispositionem exæquantes, nostrà constitutione sancimus, omnes legitimas personas, id est, per virilem sexum descendentes (sivè masculini generis sivè fœminini sint) simili modo ad jura successionis legitimæ, ab intestato vocari, secundùm sui gradus prærogativam; nec ideò excludendas, quia consanguinitatis jura, sicut germanæ, non habent.

grees the asperity of the civil law, or supplying what was deficient, added in their edicts a new order of succession, being induced to it by a motive of humanity; and, by introducing the line of cognation on account of proximity, they thus assisted the females, and gave them the possession of goods, which is called unde cognati. *But we, although strictly adhering to the law of the twelve tables in regard to females, must yet commend the humanity of the prætors, though they have not afforded a full remedy in the present case. But, since the same natural degree of relation, and the same title of agnation appertains as well to females as to males, what reason can be assigned, that males should be permitted to succeed all their* agnati, *and that no means of succession should be open to any female* agnate, *except a sister? We therefore, reducing all things to an equality, and making our disposition conformable to the laws of the twelve tables, have by our constitution ordained, that all legitimate persons, that is, descendants from males, whether male or female, shall be equally called to the rights of succession* ab intestato *according to the prerogative of their degree, and be by no means excluded although they possess not the rights of consanguinity in so near a degree as sisters.*

De filiis sororum.

§ IV. Hoc etiam addendum nostræ constitutioni existimavimus, ut transferatur unus tantummodò gradus à cognationis in legitimam successionem; ut non solùm fratris filius et filia (secundùm quod jam definivimus) ad successionem patrui sui vocentur, sed etiam germanæ consanguineæ vel sororis uterinæ filius et filia soli, et non deincèps personæ, una cum his ad jura avunculi sui perveniant: et, mortuo eo, qui patruus quidem est sui fratris filiis, avunculus autem sororis suæ soboli, simili modo ab utroque latere succedant, tanquàm si omnes ex masculis descendentes legitimo jure veniant; scilicèt ubi frater et soror superstites non sunt; (his etenim personis præcedentibus et successionem admittentibus, cæteri gradus remanent penitùs semoti;) videlicèt hæreditate non in stirpes, sed in in capita, dividendâ.

§ 4. *We have also thought fit to add to our constitution, so that one degree only is transferred from the line of cognation to the line of legitimate succession, i. e. of* agnation: *and not only the son and daughter of a brother (according to our former definition of* agnates) *shall be called to the succession of their paternal uncle, but the son or daughter of a sister, who is either by the same father or by the same mother, may also be admitted with* agnates *to the succession of their maternal uncle; but no one of the descendants of the son or daughter of a sister is by any means to be admitted. And, when a person dies, who at his decease was both a paternal and maternal uncle, that is, who had nephews or nieces living both by a brother and by a sister, then such children succeed in the same manner, as if they were all descendants from males, when the deceased leaves no brother or sister: and they take the inheritance not* per stirpes, *or according to their respective stocks, but* per capita, *i. e. by poll: but, if there be brothers or sisters, and they accept the succession, all others of a more remote degree are excluded.*

De proximis vel remotis.

§ V. Si plures sint gradus agnatorum, apertè lex duodecim tabularum proximum vocat: itaque, si (verbi gratia) sint defuncti frater, et alterius fratris filius, aut patruus, frater potior habetur. Et,

§ 5. *When there are many degrees of* agnates, *the law of the twelve tables calls for the nearest; if, for example, there is a brother of the deceased, and a son of another brother, or a paternal uncle, the bro-*

quamvis singulari numero usâ, lex duodecim tabularum proximum vocet, tamen dubium non est, quin, si plures sint ejusdem gradus, omnes admittantur. Nam et propriè proximus ex pluribus gradibus intelligitur; et tamen non dubium est, quin, licèt unus sit gradus agnatorum, pertineat ad eos hæreditas.

ther is preferred. But, although the law of the twelve tables calls the nearest agnate *in the singular number, yet doubtless, if there be many, in the same degree, they ought all to be admitted. And, although properly by the nearest degree must be understood the nearest of many, yet, if there be but one degree of* agnates, *the inheritance must undoubtedly appertain to those, who are in that degree.*

Quo tempore proximitas spectatur.

§ VI. Proximus autem, si quidem nullo testamento facto quisquam decesserit, per hoc tempus requiritur, quo mortuus est is, cujus de hæreditate quæritur; quod si facto testamento quisquam decesserit, per hoc tempus requiritur, quo certum esse cœperit, nullum ex testamento hæredem extiturum; tunc enim propriè quisque intestatus decessisse intelligitur: quod quidem aliquandò longo tempore declaratur; in quo spatio temporis sæpè accidit, ut, proximiore mortuo, proximus esse incipiat, qui moriente testatore non erat proximus.

§ 6. *When a man dies without a will, that person is esteemed his nearest of kin who was so at the time of the decease. But, when the deceased hath actually made a testament, then that person is esteemed his nearest of kin, who was so when it became certain, that there was no testamentary heir: for, until then, a man who hath made a testament, cannot be said to have died intestate: and this sometimes may not appear for a long time; during which the proximate kinsman dying, some one becomes the nearest of kin, who was not so at the death of the testator.*

De successorio edicto.

§ VII. Placebat autem, in eo genere percipiendarum hæreditatum successionem non esse; id est, ut quamvis proximus, qui secundùm ea, quæ diximus, vocatur ad hæreditatem, aut spreverit hæreditatem, aut antequam adeat, decesserit, nihilò magis legitimo jure sequentes

§ 7. *But it is settled, that there is no succession among* agnates; *so that, if the nearest* agnate *be called to an inheritance, and hath either refused the heirship, or been prevented by death from entering upon it, his own legitimate heir would not be admitted to succeed him. But*

admittantur. Quod iterùm prætores, imperfecto jure corrigentes, non in totum sinè adminiculo relinquebant, sed ex cognatorum ordine eos vocabant, utpote agnationis jure eis recluso. Sed nos, nihil perfectissimo juri deesse cupientes, nostrâ constitutione, quam de jure patronatûs humanitate suggerente protulimus, sancimus, successionem in agnatorum hæreditatibus non esse eis denegandam; cum satis absurdum erat, quod cognatis à prætore apertum est, hoc agnatis esse reclusum; maximè cum in onere quidem tutelarum et primo gradu deficiente sequens succedit; et, quod in onere obtinebat, non erat in lucro permissum.

this the prætors have in some measure corrected, and have not left the agnates *of a deceased person wholly without assistance, but have ordered that they should be called to the inheritance as* cognates, *because they were debarred from the rights of agnation. But we, earnestly desirous to render our law as perfect and complete as possible, have ordained by our constitution, which, induced by humanity, we published concerning the right of patronage, "that legitimate succession should not be denied to* agnates *in the inheritances of* agnates:" *for it was sufficiently absurd, that a right, which by means of the prætor was open to* cognates, *should be shut up and denied to* agnates: *but it was more abundantly absurd, that, in tutelages, the second degree of* agnates *should succeed upon failure of the first; and that the same law, which obtained in that, which was onerous, should not also obtain in that, which was lucrative.*

De legitima parentum successione.

§ VIII. Ad legitimam successionem nihilominùs vocatur etiam parens, qui contractâ fiduciâ filium, vel filiam, nepotem vel neptem, ac deinceps, emancipat. Quod ex nostrâ constitutione omninò inducitur, ut emancipationes liberorum semper videantur, quasi contractâ fiduciâ, fieri; cum apud veteres non alitèr hoc obtinebat, nisi specia-

§ 8. *A parent, who hath emancipated a son, a daughter, a grandson a grand-daughter, or other lineal descendant under a fiduciary contract, is admitted to their legitimate succession. But it is now effected by our constitution, that every emancipation shall for the future be regarded, as if it had been made under such a contract; although a-*

litèr contractâ fiduciâ parens manumisisset.

mong the ancients the pa never called to the legitima sion of his children, unle actually emancipated then fiduciary contract.

TITULUS TERTIUS.

DE SENATUS-CONSULTO TERTYLLIAN

D. xxxviii. T. 17. C. vi. T. 56.

De lege duodecim tabularum et jure Prætorio.

LEX duodecim tabularum ita stricto jure, utebatur, et præponebat masculorum progeniem; et eos, qui per fœminini sexûs necessitudinem sibi junguntur, adèo expellebat, ut ne quidem inter matrem et filium filiamve ultro citroque hæreditatis capiendæ jus daret; nisi quod prætores ex proximitate cognatorum eas personas ad successionem bonorum, possessione *unde cognati* accommodatâ, vocabant.

Such was the rigour of the twelve tables, that it the issue by males, and excl who were related by the f so that the right of succe not permitted to take plac cally between a mother an or a mother and her daugh the prætors, on account of imity of cognation, admi who were related by the f to the succession, giving possession of goods, called nati.

De constitutione Divi Claudii.

§ I. Sed hæ juris angustiæ postea emendatæ sunt; et primus quidem Divus Claudius matri, ad solatium liberorum amissorum, legitimam eorum detulit hæreditatem.

§ 1. *But these narrow the law were afterwards e the emperor* Claudius, *who the legal inheritance of dec dren to their mothers, in of their grief for so great*

Ad Senatus-consultum Tertyllianum. De jure liberorum.

§ II. Postea autem senatus-consulto Tertylliano, quod Divi Adriani temporibus factum est, plenissimè de tristi successione matri, non etiam aviæ, deferenda cautum est; ut mater ingenua trium liberorum jus habens, libertina quatuor, ad bona filiorum filiarumve admittatur intestato mortuorum, licèt in potestate parentis sit; ut scilicèt, cum alieno juri subjecta est, jussu ejus adeat hæreditatem, cujus juri subjecta est.

§ 2. *Afterwards by the* Tertillian senatus-consultum, *made in the reign of the emperor* Adrian, *the fullest care was taken, that the succession of children should pass to their mother, though not to their grand-mother: so that a mother, born of free parents, and having the right of three children,—also a freed-woman, having the right of four children, may be admitted, although, under power of a parent, to the goods of their intestate children. But, a mother under power cannot enter upon the inheritance of her children, but at the command of him, to whom she is subject.*

Qui præferuntur matri, vel cum ea admittuntur.

§ III. Præferuntur autem matri, liberi defuncti, qui sui sunt, quive suorum loco sunt, sivè primi gradus, sivè ulterioris. Sed et filiæ suæ mortuæ filius vel filia præponitur, ex constitutionibus, matri defunctæ, id est, aviæ suæ. Pater verò utriusque, non etiam avus et proavus, matri anteponitur; scilicèt cum inter eos solos de hæreditate agitur. Frater autem consanguineus tam filii, quam filiæ, excludebat matrem; soror autem consanguinea paritèr cum matre admittebatur. Sed, si fuerant frater et soror consanguinei, et mater liberis onerata, frater quidem matrem excludebat; communis autem erat

§ 3. *The children of a deceased son who are proper heirs, or in the place of proper heirs, either in the first or an inferior degree, are preferred to the mother. And the son, or daughter, of a deceased daughter is also by the constitutions preferred to the mother; i. e. to their grand-mother. Also the father of a son, or daughter, is preferred to the mother; not so the grand-father or great-grand-father, when the inheritance is contended for by these only without the father. Also the consanguine brother either of a son or a daughter excluded the mother; but a consanguine sister was admitted equally with her mother. If*

hæreditas ex æquis partibus fratribus et sororibus.

there had been a brother and a sister of the same blood with the deceased, the brother excluded his mother, although she had children: but the inheritance, in this case, was equally divided between brothers and sisters.

Jus novum de jure liberorum sublato.

§ IV. Sed nos constitutione, quam in codice, nostro nomine decorato, posuimus, matri subveniendum esse existimavimus, respicientes ad naturam, et puerperium, et periculum, et sæpè mortem ex hoc casu matribus illatam. Idcòque impium esse credidimus, casum fortuitum in ejus admitti detrimentum. Si enim ingenua ter, vel libertina quater, non pepererit, immeritò defraudabatur successione suorum liberorum. Quid enim peccavit, si non plures, sed paucos, peperit? Et dedimus jus legitimum plenum matribus, sivè ingenuis sivè libertinis, etsi non ter enixæ fuerint vel quater, sed eum tantum vel eam, qui quæve morte intercepti sunt, ut sic vocentur in liberorum suorum legitimam successionem.

§ 4. *But by a constitution, inserted in the code, and honoured with our name, we have thought fit, that mothers should be favoured in regard to the considering natural reason, the pains of child-birth, the danger, and death itself, which they often suffer; we therefore have esteemed it highly unjust, that the law should make that detrimental, which is in its nature merely fortuitous; for, if a married woman free-born, does not bring forth three children, or if a freed-woman does not become the mother of four, ought they, for this reason only, to be deprived of succession to their children? for how can it be imputed to them, as a crime? We therefore, not regarding any fixed number of children, have given a full right to every mother, whether ingenuous or freed, of being called to the legitimate succession of her child or children deceased, whether male or female.*

Quibus mater præponitur, et quibuscum admittitur.

§ V. Sed, cum antea constitutiones, jura legitimæ successionis perscrutantes, partim matrem adjuvabant, partim eam prægravabant, nec in solidum eam vocabant, sed,

§ 5. *In examining the constitutions of former emperors, relating to the right of succession, we observed that they were partly favourable to mothers and partly grievous; not*

usdam casibus tertiam ei abstrahentes, certis legiti-ant personis, in aliis autem ium faciebant, nobis visum tã et simplici viâ matrem s personis legitimis antepo-nè ullâ diminutione filiorum successionem accipere; ex-atris et sororis personâ, (sivè uinei sint, sivè sola cogna-ra habentes) ut quemadmo-a toti alii ordini legitimo uimus, ita omnes fratres et , (sivè legitimi sint, sive id capiendas hæreditates si-cemus: ita tamen ut, siqui-læ sorores, agnatæ vel cog-t mater defuncti vel defunc-rsint, dimidiam quidem ma-eram verò dimidiam partem sorores habeant. Si verò, superstite, et fratre vel fra-solis, vel etiam cum sororibè legitima sivè sola cogna-jura habentibus, intestatus l intestata moriatur, in capi-distribuatur hæreditas.

always calling them to the intire inheritance of their children, but in some cases depriving them of a third, which was given to certain legitimate persons; and in other cases, allowing a third. It hath therefore seemed right to us, that mothers should receive the succession of their children without any diminution, and that they should be exclusively preferred before all legitimate persons, except the brothers and sisters of the deceased, whether consanguine, *or* cognate: *but, as we have preferred the mother to all other legitimate persons, we are willing to call all brothers and sisters, legitimate or otherwise, to the inheritance together with the mother; yet in such manner, that if only the sisters,* agnate *or* cognate, *and the mother of the deceased survive, the mother shall have one half of the effects, and the sisters the other. But, if a mother survive, and also a brother or brothers, or brothers and sisters, whether* legitimate *or* cognate, *then the inheritance of the intestate son or daughter must be distributed* in capita; *i. e. into equal shares.*

De tutore liberis petendo.

L. Sed, quemadmodùm nos as prospeximus, ita eas oportet soboli consulere; sciturus od, si tutores liberis non petierint vel in locum remoti vel extra annum petere neglexerint eorum impuberum morien-

§ 6. *Having thus taken care of the interest of mothers, it behoves them in return to consult the welfare of their children. Be it known therefore, that if a mother shall neglect, during the space of a whole year, to demand a tutor for her chil-*

tium successione meritò repellentur.

dren, or to require a new tutor in the place of a former, who hath either been removed or excused, she will be deservedly repelled from the succession of such children, if they die within puberty.

De vulgo quæsitis.

§ VII. Licet autem vulgo quæsitus sit filius filiave, potest tamen ad bona ejus mater ex Tertylliano senatus-consulto admitti.

§ 7. *Although a son or a daughter be of spurious birth, yet the mother, by the* Tertyllian senatus-consultum, *may be admitted to succeed to the goods of either.*

TITULUS QUARTUS.

DE SENATUS-CONSULTO ORFICIANO.

D. xxxviii. T. 17. C. vi. T. 57.

Origo et summa senatus-consulti.

PER contrarium autem liberi ad bona matrum intestatarum admittuntur ex senatus-consulto Orficiano, quod, Orficio et Rufo consulibus, effectum est Divi Marci temporibus; et data est tam filio, quam filiæ, legitima hæreditas, etiamsi alieno juri subjecti sint; et præferuntur consanguineis et agnatis defunctæ matris.

On the contrary children are admitted to the goods of their intestate mothers, by the Orfician senatus-consultum, *which was enacted in the consulate of* Orficius *and* Rufus, *in the reign of the emperor* Marcus Antoninus; *and, by this decree, the legal inheritance is given both to sons and daughters, although under power; and they are preferred to the consanguine brothers, and to the agnates, of their deceased mother.*

De nepote et nepte.

§ I. Sed, cum ex hoc senatus-consulto nepotes et neptes ad aviæ successionem legitimo jure non vo-

§ 1. *But, since grand-sons and grand-daughters were not called by the* senatus-consultum *to the legi-*

carentur, postea hoc constitutionibus principalibus emendatum est, ut, ad similitudinem filiorum filiarumque, et nepotes et neptes vocentur.

timate succession of their grand-mother, the omission was afterwards supplied, by the imperial constitutions; so that grand-sons and grand-daughters were called to inherit, as well as sons and daughters.

De capitis diminutione.

§ II. Sciendum autem est, hujusmodi successiones, quæ ex Tertylliano et Orficiano senatus-consultis deferuntur, capitis diminutione non perimi, propter illam regulam, qua novæ hæreditates legitimæ capitis diminutione non pereunt; sed illæ solæ, quæ ex lege duodecim tabularum deferuntur.

§ 2. *But it must be observed, that those successions, which proceed from the* Tertyllian *and* Orfician senatus-consulta, *are not extinguished by diminution. For it is an established rule, that legitimate inheritances of late creation, are not destroyed by diminution; which affects those only that are founded on the law of the twelve tables.*

De vulgo quæsitis.

§ III. Novissimè sciendum est, etiam illos liberos, qui vulgò quæsiti sunt, ad matris hæreditatem ex senatus-consulto admitti.

§ 3. *It is lastly to be noted, that even spurious children are admitted by the* Orfician senatus-consultum *to the inheritance of their mother.*

De jure accrescendi inter legitimos hæredes.

§ VI. Si ex pluribus legitimis hæredibus quidam omiserint hæreditatem, vel morte, vel aliâ causa, impediti fuerint, quominus adeant, reliquis, qui adierint, accrescit illorum portio; et, licèt ante decesserint, ad hæredes tamen eorum pertinet.

§ 4. *When there are many legitimate (legal) heirs, and some renounce the inheritance, or are prevented by death, or any other cause, then the portions of such persons fall by right of accretion to those, who accept the inheritance: and, although the acceptors happen to die even before the refusal or the failure of their coheirs, yet the portions of such coheirs, will appertain to the heirs of the acceptors.*

TITULUS QUINTUS.

DE SUCCESSIONE COGNATORUM.

Tertius ordo succedentium ab intestato.

POST suos hæredes, eosque, quos inter suos hæredes prætor et constitutiones vocant, et post legitimos, (quorum numero sunt agnati, et hi, quos in locum agnatorum tam supradicta senatus-consulta, quam nostra erexit constitutio,) proximos cognatos prætor vocat.

After the proper heirs and those, whom the prætor and the constitutions call to inherit with the proper heirs, and after the legitimate heirs (among whom are the agnati, *and those, whom the above mentioned* senatus-consulta *and our constitution have numbered with the* agnati) *the prætor calls the nearest* cognates.

Qui vocantur in hoc ordine.

§ I. Quâ parte naturalis cognatio spectatur. Nam agnati capite diminuti, quique ex his progeniti sunt, ex lege duodecim tabularum inter legitimos non habentur, sed à prætore tertio ordine vocantur; exceptis solis tantummodò fratre et sorore emancipatis non etiam liberis eorum; quos lex Anastasiana cum fratribus integri juris constitutis vocat quidem ad legitimam fratris hæreditatem, sivè sororis; non æquis tamen partibus sed cum aliquâ diminutione, quam facilè est ex ipsius constitutionis verbis intelligere. Aliis vero agnatis inferioris gradus, licèt capitis diminutionem passi non sunt, tamen anteponit eos, et procul dubio cognatis.

De agnatis capite minutis.

§ 1. *By the law of the twelve tables, neither the* agnates, *who have suffered diminution, nor their issue, are esteemed legitimate heirs; but they are called by the prætor in the third order of succession: but we must except a brother and sister, (although) emancipated, but not their children; for the constitution of* Anastasius *calls an emancipated brother or sister to the succession of a brother or sister, together with those, who having not been emancipated, are* integri juris: *but it does not call them to an equal share of the succession, as may easily be collected from the words of the constitution: which prefers an emancipated brother or sister to other* agnates *of inferior degree, although unemancipated; and consequently to all* cognates.

De conjunctis per fœminas.

II. Eos etiam, qui per fœmini-
sexûs personas ex transverso
ıatione junguntur, tertio gradu
imitatis nomine, prætor ad suc-
ionem vocat.

§ 2. *Collateral relations by the female line, are called by the prætor in the third order of succession, according to their proximity.*

De liberis dâtis in adoptionem.

III. Liberi quoque, qui in
tivâ familiâ sunt, ad naturali-
arentum hæreditatem hoc eo-
gradu vocantur.

§ 3. *Children, who are in an adoptive family, are likewise called in the third order of succession to the inheritance of their natural parents.*

De vulgo quæsitis.

IV. Vulgò quæsitos nullos ha-
agnatos, manifestum est; cum
tio à patre sit, cognatio à ma-
hi autem nullum patrem ha-
intelligantur. Eâdem ratione,
ter se quidem possunt videri
nguinei esse; quia consanguini-
is jus, species est agnationis.
ùm ergò cognati sunt sibi, si-
t matri cognati sunt. Itaque
bus istis ex eâ parte competit
rum possessio, quâ proximita-
mine cognati vocantur.

§ 4. *It is manifest, that spurious children have no* agnates; *inasmuch as* agnation *proceeds from the father*, cognation *from the mother; and such children are looked upon as having no father. And, for the same reason, consanguinity cannot be said to subsist between the bastard children of the same woman; because consanguinity is a species of* agnation. *They can therefore only be allied to each other as they are related to their mother, that is, by* cognation; *and it is for this reason that all such children are called to the possession of goods by that part of the prætorian edict, by which* cognates *are called by the right of their proximity.*

Ex quoto gradu vel agnati vel cognati succedunt.

V. Hoc loco et illud necessa-
dmonendi sumus agnationis
m jure admitti aliquem ad
ditatem, etsi decimo gradu sit;
de lege duodecim tabularum

§ 5. *Here it will be proper to observe, that any person by right of* agnation *may be admitted to inherit, although he be in the tenth degree; this is allowed both by the law*

quæramus, sivè de edicto, quo prætor legitimis hæredibus datùrum se bonorum possessionem pollicetur. Proximitatis verò nomine iis solis prætor promittit bonorum possessionem, qui usque ad sextum gradum cognationis sunt, et ex septimo à sobrino sobrinàque nato natæve.

of the twelve tables, and the edict, by which the prætor promises, that he will give the possession of goods to the legitimate heirs. But the prætor promises the possession of goods to cognates, *only as far as the sixth degree of* cognation, *according to their right of proximity; and in the seventh degree, to those* cognates *only, who are the descendants of a cousin german.*

TITULUS SEXTUS.

DE GRADIBUS COGNATIONUM.

D. xxxviii. T. 10.

Continuatio, et cognationis divisio.

HOC loco necessarium est exponere, quemadmòdum gradus cognationis numerentur. Quare in primis admonendi sumus, cognationem aliam supra numerari, aliam infra, aliam ex transverso, quæ etiam à latere dicitur. Superior cognatio est parentum: inferior liberorum: ex transverso fratrum sororumve, et eorum, qui quæve ex his generantur; et convenientèr patrui, amitæ, avunculi, materteræ. Et superior quidem et inferior cognatio à primo gradu incipit; at ea, quæ ex transverso numeratur, à secundo.

It is here necessary to explain how degrees of cognation *are to be computed; and first we must observe, that there is one species of* cognation *which relates to ascendants, another to descendants, and a third to collaterals. The first and superior* cognation *is that relation, which a man bears to his parents; the second, or inferior, is that, which he bears to his children; the third is that relation which he bears to his brothers and sisters, and their issue; and also to his uncles and aunts, whether paternal or maternal. The superior and inferior* cognation *commence at the first degree; but the transverse or collateral* cognation *commences at the second.*

De primo, secundo, et tertio gradu.

§ I. Primo gradu est supra pater, mater: infra filius, filia. Secundo gradu supra avus, avia: infra nepos, neptis: ex transverso frater, soror. Tertio gradu supra proavus, proavia: infra pronepos, proneptis: ex transverso fratris sororisque filius, filia: et convenientèr patruus, amita, avunculus, matertera. Patruus est patris frater, qui Græcis πατραδελφος appellatur. Avunculus est frater matris, qui græce μητραδελφος dicitur: et uterque promiscuè θειος appellatur. Amita est patris soror, quæ græce πατραδελφη appellatur; matertera vero matris soror, quæ græce μητραδελφη dicitur: et utraque promiscuè θεια appellatur.

§ 1. *A father, or a mother, is in the first degree in the right line ascending: and a son, or a daughter, is also in the first degree in the right line descending. A grand-father, or a grand-mother, is in the second degree in the right line ascending: and a grand-son or grand-daughter, is in the second degree in the right line descending: and a brother or a sister, is also in the second degree in the colluteral line. A great-grand-father, or a great-grand-mother, is in the third degree in the right line ascending: and a great-grand-son, or great-grand-daughter, is in the third degree in the right line descending; and the son or daughter of a brother or sister is also in the third degree in the collateral line; and by a parity of reasoning an uncle, or an aunt, whether paternal or maternal, is also in the third degree. A paternal uncle, called* patruus, *is a father's brother; a maternal uncle, called* avunculus, *is a mother's brother; a paternal aunt, called* amita, *is a father's sister; and a maternal aunt, called* matertera, *is a mother's sister. And each of these persons is called in Greek* θειος *or* θεια *promiscuously.*

Quartus gradus.

§ II. Quarto gradu supra abavus abavia: infra abnepos, abneptis: ex transverso fratris sororisque nepos neptisve: et convenientèr patruus magnus, amita magna, id est, avi frater et soror: item avunculus mag-

§ 2. *A great-great-grand-father, or a great-great-grand-mother, is in the fourth degree in the right line ascending; and a great-great-grand-son, or a great-great-grand-daughter, is in the fourth degree in the*

nus et matertera magna, id est, aviæ frater et soror: consobrinus, consobrina, id est, qui quæve ex sororibus aut fratribus procreantur. Sed quidam rectè consobrinos eos propriè dici putant, qui ex duabus sororibus progenerantur, quasi consororinos: eos verò, qui ex duobus fratribus progenerantur, propriè fratres patrueles vocari: si autèm ex duobus fratribus filiæ nascuntur, sorores patrueles appellari. At eos, qui ex fratre et sorore progenerantur, amitinos propriè dici putant. Amitæ tuæ filii consobrinum te appellant, tu illos amitinos.

right line descending. Also, in the transverse or collateral line, the grandson, or the grand-daughter, of a brother or a sister, is in the fourth degree; so is a great uncle, or great aunt, paternal or maternal and cousins german, (consobrini). *But some have been rightly of opinion, that the children of sisters are properly* consobrini, *quasi* consororini; *that the children of brothers are properly brothers* patruel, *if males; and sisters* patruel, *if females; and that, when there are children of a brother, and children of a sister, they are properly* amitini; *but the sons of your aunt by the father's side call you* consobrinus, *and you call them* amitini.

Quintus gradus.

§ III. Quinto gradu supra atavus, atavia: infra atnepos, atneptis: ex transverso, fratris sororisque pronepos, proneptis: et convenientèr propatruus, pròamita, id est, proavi frater et soror: et proavunculus et promatertera, id est, proavi frater et soror: item fratris patruelis, vel sororis patruelis, consobrini et consobrinæ, amitini et amitinæ filius, filia: propior sobrino, propior sobrina; hi sunt patrui magni, amitæ magnæ, avunculi magni, materteræ magnæ filius, filia.

§ 3. *A great-grand-father's grand-father, or a great-grand-father's grand-mother, is in the fifth degree in the line ascending, and a great-grandson, or a great-grand-daughter, of a grandson or a grand-daughter is in the fifth degree in the line descending. In the transverse or collateral line, a great-grandson, or great-grand-daughter, of a brother or sister, is also in the fifth degree; and consequently so is a great-grand-father's brother or sister, or a great-grand-mother's brother or sister. The son or daughter also of a cousin german is in the fifth degree: and so is the son or daughter of a great uncle or great aunt, paternal or maternal; and such son, or daughter is called* propior sobrino *and* propior sobrina.

Sextus gradus.

§ IV. Sexto gradu supra tritavus tritavia: infra trinepos, trineptis: ex transverso fratris sororisque abnepos abneptis: et convenientèr abpatruus abamita, id est, abavi frater et soror: abavunculus, abmatertera, id est, abaviæ frater et soror: itèm propatrui, proamitæ proavunculi, promateterræ filius, filia: itèm propius sobrino sobrinave filius, filia: item consobrini consobrinæ nepos, neptis: itèm sobrini, sobrinæ; id est, qui quæve ex fratribus vel sororibus patruelibus, vel consobrinis, vel amitinis, progenerantur.

§ 4. *A great-grand-father's great-grand-father, or a great-grand-father's great-grand-mother, is in the sixth degree in the line ascending; and the great-grandson, or great-grand-daughter of a great-grandson, or a great-grand-daughter, is likewise in the sixth degree in the line descending. And, in the transverse or collateral line, a great-great-grandson, or a great-great-grand-daughter, of a brother or sister, is also in the sixth degree: and consequently a great-great-grand-father's brother or sister, and a great-great-grand-mother's brother or sister, is in the sixth degree. And the son or daughter of a great-great-uncle, or great-great-aunt, paternal or maternal, is also in the sixth degree; and so also is the son or daughter of the son or daughter of a great-uncle or great-aunt, paternal or maternal. The grandson also, or the grand-daughter, of a cousin german is in the sixth degree; and, in the same degrees between themselves, we reckon the* sobrini *and the* sobrinæ; *that is, the sons and daughters of cousins german in general, whether such cousins german are so related by two brothers, or by two sisters, or by a brother and a sister.*

De reliquis gradibus.

§ V. Hactenùs ostendisse sufficiat quemadmodùm gradus cognationis numerentur: namque ex his palàm est intelligere, quemadmodùm ulteriores quoque gradus nu-

§ 5. *It suffices to have shewn thus far, how degrees of* cognation *are enumerated: and, from the examples given, the more remote degrees may be computed; for every person*

merare debeamus: quippè semper generata persona gradum adjicit; ut longè facilius sit respondere, quoto quisque gradu sit, quam propriâ cognationis appellatione quemquam denotare.

generated always adds one degree; so that it is much easier to determine, in what degree any person is related to another, than to denote such person by a proper term of cognation.

De gradibus agnationis.

§ VI. Agnationis quoque gradus eodum modo numerantur.

§ 6. *The degrees of* agnation *are reckoned in the same manner.*

De graduum descriptione.

§ VII. Sed, cum magis veritas oculatâ fide, quam per aures animis hominum, infigatur, ideò necessarium duximus, post narrationem graduum, eos etiam præsenti libro inscribi, quatenus possint et auribus et oculorum inspectione adolescentes perfectissimam graduum doctrinam adipisci.

§ 7. *But as truth is fixed in the mind much better by the eye, than by the ear, we have thought it necessary to subjoin, to the account already given, a tablet with the degrees of* cognation *inscribed upon it; that the student, both by hearing and seeing, may attain a perfect knowledge of them.*

TITULUS SEPTIMUS.

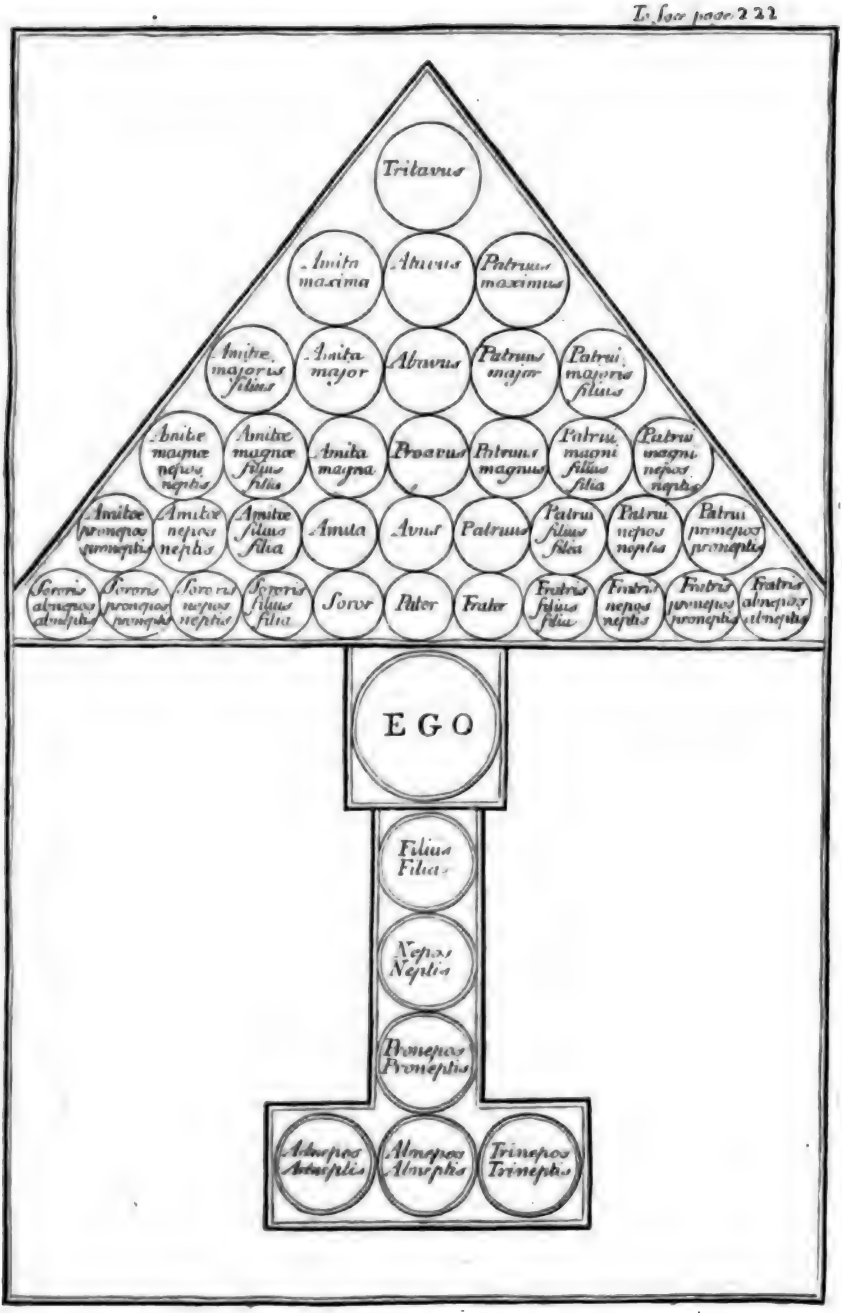
DE SERVILI COGNATIONE.

D. xxxviii. T. 2. C. vi. T. 4.

ILLUD certum est, ad serviles cognationes illam partem edicti, quâ proximitatis nomine bonorum possessio promittitur, non pertinere: nam nec ullâ antiquâ lege talis cognatio computabatur. Sed nostrâ constitutione, quam pro jure patronatûs fecimus, (quod jus usque ad nostra tempora satis obscurum atque nube plenum, et undique confusum fuerat,) et hoc humanitate

It is certain, that the part of the edict, in which the possession of goods is promised, according to the right of proximity, does not relate to servile cognation; *which hath not been regarded by any ancient law. But, by our own constitution, concerning the right of patronage, which right was heretofore obscure, and every way confused, we have ordained (humanity so suggesting)*

Ts. Soc page 221



suggerente concessimus, ut, si quis, in servili constitutus consortio, liberum vel liberos habuerit, sivè ex liberâ sivè ex servilis conditionis muliere, vel contra, serva mulier ex libero vel servo habuerit liberos cujuscunque sexûs, et, ad libertatem his pervenientibus, ii, qui ex servili ventre nati sunt, libertatem meruerint, vel, dum mulieres liberæ erant, ipsi in servitute eos habuerint, et postea ad libertatem pervenerint, ut hi omnes ad successionem patris vel matris veniant, patronatûs jure in hac parte sopito. Hos etenim liberos non solùm in suorum parentum successionem, sed etiam alterum in alterius successionem mutuam, vocavimus; ex illâ lege specialitèr eos vocantes, sivè soli inveniantur, qui in servitute nati et postea manumissi sunt; sivè unà cum aliis, qui post libertatem parentum concepti sunt; sivè ex eodem patre, sivè ex eadem matre, sivè ex aliis nuptiis; ad similitudinem eorum, qui ex justis nuptiis procreati sunt.

that, if a slave shall have a child, or children, either by a free-woman, or by a bond-woman, with whom he lives in contubernio, *and, on the contrary, that, if a bond-woman shall have a child, or children, of either sex by a free-man, or by a slave, with whom she so lives, and such father and mother are afterwards enfranchised, the children shall succeed to their father or mother, without regarding the right of patronage. We have not only called these children to succeed to their parents, but also mutually to each other, whether they are sole in succession, as having all been born in servitude and afterwards manumitted, or whether they succeed with others, who were conceived after the infranchisement of their parents; and whether they are all by the same father and mother, or by a different father, or mother; and, that children born in slavery, but manumitted, should succeed in the same manner, as the issue of parents legally married.*

Collatio ordinum et graduum.

§ I. Repetitis itaque omnibus, quæ jam tradidimus, apparet non semper eos, qui parem gradum cognationis obtinent, paritèr vocari: eoque amplius, ne eum quidem, qui proximiore sit cognatus, semper potiorem esse. Cum enim prima causa sit suorum hæredum, et eorum, quas inter suos hæredes enumeravimus, apparet, pronepotem vel abnepotem defuncti potio-

§ 1. *From what hath been said, it appears that those, who are in an equal degree of* cognation, *are not always called equally to the succession; and farther, that even the nearest of kin, is not constantly to be preferred. For, inasmuch as the first place is given to proper heirs, and to those who are numbered with proper heirs, it is apparent, that the great-grand-son, or great-great-*

rem esse, quam fratrem, aut patrem, aut matrem defuncti: cum alioqui pater quidem et mater (ut supra quoque tradidimus) primum gradum cognationis obtineant, frater verò secundum, pronepos autem tertio gradu sit cognationis, et abnepos quarto: nec interest, in potestate morientis fuerit, an non, quod vel emancipatus, vel ex emancipato, aut fœmineo sexu, propagatus est. Amotis quoque suis hæredibus, et quos inter suos hæredes vocari diximus, agnatus, qui integrum jus habet agnationis, etiamsi longissimo gradu sit, plerumque potior habetur, quam proximior cognatus: nam patrui nepos vel pronepos avunculo vel materteræ præfertur. Toties igitùr dicimus, aut potiorem haberi eum, qui proximiorem gradum cognationis obtinet, aut paritèr vocari eos, qui cognati sunt; quoties neque suorum hæredùm, quique inter suos hæredes sunt, neque agnationis jure aliquis præferri debeat, secundùm ea, quæ tradidimus: exceptis fratre et sorore emancipatis, qui ad successionem fratrum vel sororum vocantur; qui, etsi capite diminuti sunt, tamen præferuntur cæteris ulterioris gradus agnatis.

grand-son, is preferred to the brother or even the father or mother of the deceased: although a father and mother, (as we have before observed,) obtain the first degree of relation, a brother the second, a great-grand-son the third, and a great-great-grand-son the fourth; neither does it make any difference, whether such grand-children were under the power of the deceased, at the time of his death, or out of his power; either by being themselves emancipated, or by being the children of those who were so; neither can it be objected, that they are descended by the female line. But, when there are no proper heirs, nor any of those, who are permitted to rank with them, then an agnate, *who hath the full right of* agnation *in him, although he be in the* most distant *degree, is generally preferred to a* cognate, *who is in the nearest degree; thus the grand-son or great-grand-son of a paternal uncle is preferred to a maternal uncle or aunt. Hence, when there are no proper heirs, nor any, who are numbered with them, nor any, who ought to be preferred by the right of* agnation, *(as we have before noted,) then the nearest in degree of* cognation, *is called to the succession; and if there be many in the same degree, they are all called equally. But a brother and sister, although emancipated, are yet called to the succession of brothers and sisters; for, although they have suffered diminution, they are nevertheless preferred to all* agnates *of a more remote degree.*

TITULUS OCTAVUS.

DE SUCCESSIONE LIBERTORUM.

D. xxxviii. T. 2.

Qui succedunt. De lege duodecim tabularum.

NUNC de libertorum bonis videamus. Olim itaque licebat liberto patronum suum impunè testamento præterire: nam ita demum lex duodecim tabularum ad hæreditatem liberti vocabat patronum, si intestatus mortuus esset libertus, hærede suo nullo relicto. Itaque, intestato mortuo liberto, si is suum hæredem reliquisset, patrono nihil in bonis ejus juris erat. Et, siquidèm ex naturalibus liberis aliquem suum hæredem reliquisset, nulla videbatur querela; si verò adoptivus filius fuisset, apertè iniquum erat, nihil juris patrono superesse.

Let us now treat of the succession of freed-men. A freed-man might formerly, with impunity, omit in his testament any mention of his patron: for the law of the twelve tables called the patron to the inheritance, only when the freed-man died intestate without proper heirs; *therefore, though he had died intestate, yet, if he had left a proper heir, the patron would have received no benefit: and indeed, when the natural and legitimate children of the deceased became his heirs, there seemed no cause of complaint; but, when the freed-man left only an adopted son, it was manifestly injurious, that the patron should have no claim.*

De jure prætorio.

§ I. Qua de causâ, postea, prætoris edicto hæc juris iniquitas emendata est. Sivè enim faciebat testamentum libertus, jubebatur ita testari, ut patrono partem dimidiam bonorum suorum relinqueret; et, si aut nihil aut minus parte dimidiâ reliquerat, dabatur patrono, contra tabulas testamenti, partis dimidiæ bonorum possessio: sivè intestatus moriebatur, suo hærede relicto filio adoptivo, dabatur æquè patrono

§ 1. *The law was therefore afterwards amended by the edict of the prætor: for every freed-man, who made his testament, was commanded so to dispose of his effects, as to leave a moiety to his patron: and, if the testator left nothing, or less than a moiety, then the possession of half was given to the patron* contra tabulas, *i. e. contrary to the disposition of the testament. And, if a freed-man died intestate, leaving an adopt-*

contra hunc suum hæredem partis dimidiæ bonorum possessio. Prodesse autem liberto solebant, ad excludendum patronum, naturales liberi, non solùm quos in potestate mortis tempore habeat, sed etiam emancipati, et in adoptionem dati, si modo ex aliquâ parte scripti hæredes erant, aut præteriti contra tabulas bonorum possessionem ex edicto prætorio petierant. Nam exhæredati nullo modo repellebant patronum.

ed son his heir, the possession of a moiety was given to the patron notwithstanding: yet, not only the natural and lawful children of a freedman, whom he had under his power at the time of his death, excluded the patron, but those children also, who were emancipated, and given in adoption, if they were written heirs for any part, or even, although they were omitted, if they had requested the possession CONTRA TABULAS, *by virtue of the prætorian edict. But disinherited children by no means repelled the patron.*

De lege Papia.

§ II. Postea verò lege Papia adaucta sunt jura patronorum, qui locupletiores libertos habebant. Cautum enim est, ut ex bonis ejus, qui sestertium centum millium patrimonium reliquerat, et pauciores quam tres liberos habebat, sivè is testamento facto, sivè intestatus mortuus erat, virilis pars patrono deberetur. Itaque, cum unum quidem filium filiamve hæredem reliquerat libertus, perindè pars dimidia debebatur patrono, ac si is sinè ullo filio filiâve intestatus decessisset: cum verò duos duasve hæredes reliquerat, tertia pars debebatur patrono: si tres reliquerat, repellebatur patronus.

§ 2. *But afterwards the rights of patrons, who had wealthy freed-men were inlarged by the* Papian *law: which provides that he shall have a man's share out of the effects of his freed-man, whether dying testate or intestate, who hath left a patrimony of an hundred thousand* sestertii *and fewer than three children: so that, when a freed-man hath left only one son or daughter, a moiety is due to the patron, as if the deceased had died testate without either son or daughter. But, when there are two heirs, male or female, a third part only is due to the patron; and, when there are three, the patron is wholly excluded.*

De constitutione Justiniani.

§ III. Sed nostra constitutio, (quam pro omni natione græcâ lingua compendioso tractatu habito

§ 3. *But our constitution, published in a compendious form, in the Greek language, for the benefit of*

composuimus,) ita hujusmodi causam definivit; ut, siquidèm libertus vel liberta minores centenariis sint, id est, minus centum aureis habeant substantiam, (sic enim legis Papiæ summam interpretati sumus, ut pro mille sestertiis unus aureus computetur,) nullum locum habeat patronus in eorum successione, si tamen testamentum fecerint; sin autem intestati decesserint, nullo liberorum relicto, tunc patronatûs jus, quod erat ex lege duodecim tabularum, integrum reservavit. Cum verò majores centenariis sint, si hæredes vel bonorum possessores liberos habeant, sivè unum, sivè plures, cujuscunque sexûs vel gradûs, ad eos successiones parentum deduximus, patronis omnibus modis cum suâ progenie semotis. Sin autem sinè liberis decesserint, siquidem intestati, ad omnem hæreditatem patronos patronasque vocavimus. Si verò testamentum quidem fecerint, patronos autem aut patronas præterierint, cum nullos liberos haberent, vel habentes eos exhæredaverint, vel mater sivè avus maternus eos præterierint, ita quod non possint argui inofficiosa eorum testamenta, tunc ex nostrâ constitutione per bonorum possessionem contra tabulas, non dimidiam, ut antea, sed tertiam partem bonorum liberti consequantur; vel quod deest eis, ex constitutione nostrâ repleatur, si quando minus tertiâ parte bonorum suorum libertus vel liberta eis reliquerit: ita sinè onere, ut nec liberis liberti libertæve ex eâ parte

all nations,) ordained, that, if a freed-man, or freed-woman, die possessed of less than an hundred aurei, *(for thus have we interpreted the sum mentioned in the* Papian law, *counting one* aureus *for a thousand* sestertii,*) the patron shall not be intitled to any share in a testate succession. But, where a freed-man, or woman, dies intestate, and without children, we have reserved the right of patronage intire, as it formerly was, according to the law of the twelve tables. But, if a freed person die worth more than an hundred* aurei, *and leave one child, or many, of either sex or any degree, as the heirs and possessors of his goods, we have permitted, that such child or children shall succeed their parent to the intire exclusion of the patron and his heirs: and if any freed-persons die without children and intestate, we have called their patrons or patronesses to their whole inheritances. And if any freed-person, worth more than an hundred* aurei, *hath made a testament, omitted his patron, and left no children, or hath disinherited them; or if a mother, or maternal grand-father, being freed-persons, have omitted to mention their children in their wills, so that such wills can not be proved to be inofficious, then, by virtue of our constitution, the patron shall succeed, not to a moiety as formerly but to the third part of the estate of the deceased, by possession contra tabulas: and, when freed-persons leave less than the third part*

legata vel fideicommissa præstentur, sed ad cohæredes eorum hoc onus redundet: multis aliis casibus à nobis in præfatâ constitutione congregatis, quos necessarios esse ad hujusmodi dispositionem juris perspeximus: ut tam patroni patronæque quam liberi eorum, nec non qui ex transverso latere veniunt usque ad quintum gradum, ad successionem libertorum libertarumve vocentur, sicùt ex eâ constitutione intelligendum est. Et, si ejusdem patroni vel patronæ, vel duorum duarumque pluriumve, liberi sint, qui proximior est, ad liberti vel libertæ vocetur successionem; et in capita, non in stirpes, dividatur successio; eodem modo et in iis, qui ex transverso latere veniunt, servando. Penè enim consonantia jura ingenuitatis et libertinitatis in successionibus fecimus.

effects to their patrons, our constitution ordains, that the deficiency shall be supplied; nor shall this third part, be subject to trusts, *or legacies, even for the benefit of the children of the deceased; for the co-heirs only of the patron shall bear this burden. In the before-mentioned constitution, we have collected many more cases, necessary in relation to the right of patronage; that patrons and patronesses, their children and collateral relations, as far as the fifth degree, might be called to the succession of their freed-men and freed-women; as will appear more fully from the ordinance itself. And, if there be many children of one, two or more patron or patroness, the nearest in degree, is called to the succession of his freed-man or freed-woman; and, when there are many in equal degree, the estate must be divided* in capita *and not* in stirpes: *the same order is decreed to be observed among the collaterals of patrons and patronesses: for we have rendered the laws of succession almost the same both as to* ingenui *and* libertini.

Quibus libertinis succeditur.

§ IV. Sed hæc de iis libertinis hodie dicenda sunt, qui in civitatem Romanam pervenerunt, cum nec sint alii liberti, simul et Dedititiis et Latinis sublatis, cum Latinorum successiones nullæ penitùs erant; quia, licèt ut liberi vitam suam peragebant, attamèn ipso ultimo spiritu simul animam atque libertatem

§ 4. *What we have said relates to modern freed-men who are all citizens of* Rome; *for there is now, no other, the* Dedititii *and* Latini *being abolished: the latter of whom never enjoyed any right of succession; for although they led the lives of freed-men, yet, with their last breath, they lost both their lives and liber-*

amittebant: et, quasi servorum, ita bona eorum jure quodammodo peculii ex lege Junia Norbana manumissores detinebant. Postea verò senatus-consulto Largiano cautum fuerat, ut liberi manumissoris, non nominatim exhæredati facti, extraneis hæredibus eorum in bonis Latinorum præponerentur. Quibus etiam supervenit Divi Trajani edictum, quod eundem hominem, si invito vel ignorante patrono, ad civitatem Romanam venire ex beneficio principis festinarat, faciebat quidem vivum civem, Latinum verò morientem. Sed nostrâ constitutione, propter hujusmodi conditionum vices et alias difficultates, cum ipsis Latinis etiam legem Juniam, et senatus-consultum Largianum, et edictum Divi Trajani, in perpetuum deleri censuimus, ut omnes liberi civitate Romanâ fruantur; et mirabili modo quibusdam adjectionibus ipsas vias, quæ in Latinitatem ducebant ad civitatem Romanam capiendam transposuimus.

ties: for their possessions, like the goods of slaves, were detained by their manumittor, who possessed them, as a peculium, *by virtue of the law* Junia Norbana. *It was afterwards provided by the* senatus-consultum Largianum, *that the children of a manumittor, not disinherited by name, should be preferred to any strangers, whom a manumittor might constitute his heirs: then followed the edict of* Trajan, *by which if a slave either against the will or without the knowledge of his patron should obtain the freedom of* Rome *by favour of the emperor, such slave should continue free, while living, but, at his death, should be regarded only as a* Latin. *But we, being averse to these changes of condition, and dissatisfied with the difficulties attending them, have thought proper, by our constitution, for ever to abolish, together with the* Latins, *the law* Junia, *the* senatus-consultum Largianum, *and the edict of* Trajan; *so that all freed-men may become freed-men of* Rome. *And we have happily contrived by some additions, that the manner of conferring the freedom of* Latins *should now become the manner of conferring the freedom of* Rome.

TITULUS NONUS.

DE ASSIGNATIONE LIBERTORUM.

D. xxxviii. T. 4.

An assignari possit, et quis assignationis effectus.

IN summâ, (quod ad bona libertorum attinet,) admonendi sumus, censuisse senatum, ut quamvis ad omnes patroni liberos, qui ejusdem gradus sunt, æqualiatèr bona libertorum pertineant; tamen licere parenti, uni ex liberis assignare libertum, ut post mortem ejus solus is patronus habeatur, cui assignatus est; et cæteri liberi qui ipsi quoque ad eadem bona, nullà assignatione interveniente, paritèr admitterentur, nihil juris in his bonis habeant; sed ita demùm pristinum jus recipiant, si is, cui assignatus est, decesserit, nullis liberis relictis.

Respecting the possession of freed-men, we must remember the decree of the senate; whereby, although the goods of freed-men belong equally to all the children of the patron, who are in the same degree, yet it is lawful for a parent to assign a freed-man to any one of his children, so that, after the death of the parent, the child, to whom the freed-man was assigned, is solely to be esteemed his patron: and the other children, who would have been equally admitted had not this been the case, are wholly excluded; but, if the assignee should die without issue, the excluded children regain their former right.

De sexu assignati, et de sexu graduque ejus, cui assignatur.

§ I. Nec tantùm libertum, sed etiam libertam, et non tantùm filio nepotive, sed etiam filiæ neptive, assignare permittitur.

§ 1. *Freed-persons of either sex are assignable; not only to a son or grandson, but to a daughter or grand-daughter.*

De liberis in potestate vel emancipatis.

§ II. Datur autem hæc assignandi facultas ei, qui duos pluresve liberos in potestate habebit, ut eis, quos in potestate habet, assignare libertum libertamve liceat. Undè quærebatur, si eum, cui assignavit, postea emancipaverit, num evanescat assignatio? Sed placuit eva-

§ 2. *The power of assigning freed-persons is given to him, who hath two or more children un-emancipated, so that a father may assign a freed-man or freed-woman to children retained under his power: hence it became a question, if a father should assign a freed-man to his son*

nescere: quod et Juliano et aliis plerisque visum est.

and afterwards emancipate that son, whether the assignment would not be null? which hath been determined in the affirmative; and so thought Julian *and many others.*

Quibus modis aut verbis assignatio fit: et de senatus-consulto.

§ III. Nec interest, an testamento quis assignet, an sinè testamento; sed etiam quibuscunque verbis patronis hoc permittitur facere, ex ipso SC. quod Claudianis temporibus factum est, Sabellio Rufo et Asterio Scapula Consulibus.

§ 3. *It is the same, whether the assignment of a freed-man be made by testament, or not; for patrons may assign verbally; under the* senatus-consultum, *passed in the reign of* Claudian *in the consulate of* Sabellius Rufus *and* Asterius Scapula.

TITULUS DECIMUS.

DE BONORUM POSSESSIONIBUS.

D. xxxvii. T. 1.

Cur introductæ bonorum possessiones; et quis sit earum effectus.

JUS bonorum possessionis introductum est à prætore, emendandi veteris juris gratiâ: nec solùm in intestatorum hæreditatibus vetus jus eo modo prætor emendavit, sicut supra dictum est; sed in eorum quoque, qui testamento facto decesserint. Nam, si alienus posthumus hæres fuerit institutus, quamvis hæreditatem jure civili adire non potuerat, cum institutio non valebat, honorario tamen jure, bonorum possessor efficiebatur; videlicèt cum à prætore adjuvabatur. Sed et is

The right of succeeding by the possession of goods, was introduced by the prætor in amendment of the ancient law; which he corrected as it regarded not only the inheritances of intestates, (as before observed,) but of those also who die testate; for, a posthumous stranger being instituted heir, although he could not enter upon the inheritance by the civil law, inasmuch as his institution would not be valid, yet by the (prætorian or) honorary law, he might be made the possessor of the goods,

à nostrâ constitutione hodie rectè hæres instituitur, quasi et jure civili non incognitus. Aliquandò tamen, neque emendandi neque impugnandi veteris juris, sed majis confirmandi gratiâ, prætor pollicetur bonorum possessionem: nam illis quoque, qui, rectè testamento facto, hæredes instituti sunt, dat secundum tabulas bonorum possessionem. Item ab intestato suos hæredes, et agnatos, ad bonorum possessionem vocat: sed et remotâ quoque bonorum possessione ad eos pertinet hæreditas jure civili. Quos autem solus prætor vocat ad hæreditatem, hæredes quidem ipso jure non fiunt: nam prætor hæredem facere non potest: per legem enim tantùm, vel similem juris constitutionem, hæredes fiunt, vel per senatus-consulta et constitutiones principales: sed, cum eis prætor dat bonorum possessionem, loco hæredum constituuntur, et vocantur bonorem possessores. Adhuc autem et alios complures gradus prætor fecit in bonorum possessionibus dandis, dum id agebat, ne quis sinè successore moreretur. Nam, angustissimis finibus constitutum per legem duodecim tabularum, jus percipiendarum hæreditatum prætor ex bono et æquo dilatavit.

when he had received the assistance of the prætor. *Such stranger may at this time, by our constitution, be legally instituted heir as a person not unknown to the civil law. But the prætor sometimes bestows the possession of goods, intending neither to amend nor impugn the old law, but to confirm it: for he gives possession* secundum tabulas *to those, who are appointed heirs by regular testament. He also calls* proper heirs *and* agnates *to the possession of the goods of intestates; and yet the inheritance would be their own by the* civil law, *although the prætor did not interpose his authority. But those, whom the prætor calls to an inheritance merely by virtue of his office, do not become legal heirs; inasmuch as the prætor cannot make an heir; for heirs are made only by law, or by what has the effect of a law, as a decreee of the senate, or an imperial constitution. But, when the prætor gives any persons the possession of goods, they stand in the place of heirs, and are called the possessors of the goods. He hath also devised many other orders of persons, to whom the possession of goods can be granted, so that no man may die without a successor: and, by the rules of justice and equity, he hath enlarged the right of taking inheritances, which was bounded within very narrow limits by the laws of the twelve tables.*

De speciebus ordinariis. Jus vetus.

§ I. Sunt autèm bonorum possessiones ex testamento quidem hæ; prima, quæ præteritis liberis datur vocaturque *contra tabulas:* secunda, quam omnibus jure scriptis hæredibus prætor pollicetur; ideòque vocatur *secundum tabulas.* Et, cum de testatis prius locutus est, ad intestatos transitum fecit: et primo loco suis hæredibus, et iis, qui ex edicto prætoris inter suos hæredes connumerantur, dat bonorum possessionem, quæ vocatur *unde liberi.* Secundo, legitimis hæredibus. Tertio, decem personis, quas extraneo manumissori præferebat. Sunt autem decem personæ hæ; pater, mater, avus, avia, tam paterni quam materni; itèm filius, filia; nepos, neptis, tam ex filio, quam ex filia; frater sororve, consanguinei vel uterini. Quarto, cognatis proximis. Quinto *tanquam ex familia.* Sexto, patrono patronæque, liberisque eorum et parentibus. Septimo, viro et uxori. Octavo, cognatis manumissoris.

§ 1. *The possessions of goods or prætorian testamentary successions, are these. First, that which is given to children, not mentioned in the testament; this is called* possession contrary to the testament. *The second, that which thē prætor promises to all written heirs, and is therefore called* possession according to the testament. *These being fixed he goes to intestacies; and first he gives the possession called* unde liberi, *to the* proper heirs, *or to those, who by the* prætorian edict *are numbered among the* proper heirs: *secondly, to the legitimate (legal) heirs: thirdly, to ten persons, in preference to a stranger, who was the* manumittor, *viz. to a father, a mother, or a grand-father or grand-mother, paternal or maternal; to a son, a daughter, or to a grand-son or grand-daughter, as well by a daughter as by a son; to a brother or sister, either consanguine or uterine: fourthly, to the nearest* cognates: *fifthly, to those who are,* as it were, *of the family: sixthly, to the patron or patroness, and to their children, and their parents: seventhly, to an husband and wife: eighthly, to the* cognates *of a* manumittor *or patron.*

Jus novum.

§ II. Sed eas quidem prætoria introduxit jurisdictio: à nobis tamèn nihil incuriosum prætermissum est; sed, nostris constitutionibus omnia corrigentes, *contra tabu-*

§ 2. *The prætor's authority hath introduced these successions; as to ourselves, having passed over nothing negligently, we have admitted by our constitutions the possession of goods*

las quidem *et secundum tabulas* bonorum possessiones admissimus, utpote necessarias constitutas: nec non ab intestato, *unde liberi, et unde legitimi*, bonorum possessiones. Quæ autem in prætoris edicto quinto loco posita fuerat, id est, *unde decem personæ*, eam pio proposito et compendioso sermone supervacuam ostendimus. Cum enim præfata bonorum possessio decem personas præponebat extraneo manumissori nostra constitutio, quam de emancipatione liberorum fecimus, omnibus parentibus eisdemque manumissoribus, contracta fiducia, manumissionem facere dedit; ut ipsa manumissio eorum hoc in se habeat privilegium, et supervacua fiat supradicta bonorum possessio. Sublatâ igitur prædictâ quintâ bonorum possessione in gradum ejus sextam antea bonorum possessionem induximus, et quintam fecimus, quam prætor proximis cognatis pollicetur. Cumque antea fuerat septimo loco bonorum possessio, *tanquam ex familia*, et octavo, *unde patroni patronæque, liberi et parentes eorum*, utramque per constitutionem nostram, quam de jure patronatûs fecimus, penitùs evacuavimus. Cum enim, ad similitudinem successionis ingenuorum, libertinorum successiones posuerimus, quas usque ad quintum gradum tantummodò coarctavimus, ut sit aliqua inter ingenuos et libertinos differentia, sufficit eis tam *contra tabulas* bonorum possessio, quam *unde legitimi*, et *unde cognati*, ex quibus possunt

contra tabulas *and* secundum tabulas, *as necessary; and also the possessions* ab intestato, *called* unde liberi *and* unde legitimi; *but we have briefly shewn, that the possession, called* unde decem personæ, *which was ranked by the prætor's edict in the fifth order, was unnecessary: for, whereas that possession preferred ten kinds of persons to a stranger, being the manumittor, our constitution on that subject, hath permitted all parents to manumit their children, under the presumption of a* fiduciary *contract; so that the possession* unde decem personæ *is now useless. The afore-mentioned fifth possession being thus abrogated, we have now made that the fifth, which was formerly the sixth, by which the prætor gives the succession to the nearest* cognates. *And, whereas formerly the possession* tanquam ex familiâ, *was in the seventh place, and the possession* unde patroni patronæque, liberi et parentes eorum, *was in the eighth, we have now annulled them both by our* ordinance *concerning the right of patronage. And having brought the successions of the* libertini *to a similitude with those of the* ingenui, *(except, that we have limited the former to the fifth degree, so that there may still remain some difference between them) we think, that the possessions* contra tabulas, unde legitimi, *and* unde cognati *may suffice, by which all persons may vindicate their rights; the niceties and inextricable errors of those two kinds of*

sua jura vindicare, omni scrupulositate et inextricabili errore istarum duarum bonorum possessionum resoluto. Aliam vero bonorum possessionem, quæ *unde vir et uxor* appellatur, et nono loco inter veteres bonorum possessiones posita fuerat, et in suo vigore servavimus, et altiore loco, id est, sexto, eam posuimus: decima quoque veteri bonorum possessione, quæ erat *unde cognati manumissoris*, propter causas enumeratas meritò sublata, ut sex tantummodò bonorum possessiones ordinariæ permaneant, suo vigore pollentes.

possessions, tanquam ex familia *and* unde patroni, *being removed. The other possession of goods*, *called* vir et uxor, *which held the ninth place among the ancient possessions, we have preserved in full force and have placed in an higher, to wit, the sixth degree. The tenth of the ancient possessions*, *called* unde cognati manumissoris, *being deservedly abolished for causes already enumerated, there now remain in force only six ordinary possessions of goods.*

Species extraordinaria.

§ III. Septima eas secuta, quam optimâ ratione prætores introduxerunt: novissimè enim promittitur edicto iis etiam bonorum possessio, quibus, ut detur, lege vel senatusconsulto vel constitutione comprehensum est: quam neque bonorum possessionibus, quæ ab intestato veniunt, neque iis, quæ ex testamento sunt, prætor stabili jure connumeraverit; sed quasi ultimum et extraordinarium auxilium (prout res exigit) accommodavit, scilicèt iis, qui ex legibus, senatus-consultis, constitutionibusve principum, ex novo jure, vel ex testamento, vel ab intestato veniunt.

§ 3. *To these a seventh possession hath been added, which the prætors have very properly introduced: for, by a late edict, this possession is promised to all those, to whom it is appointed by any law, senatus-consultum, or constitution: and the prætor hath not positively numbered this possession of goods either with the possessions of the goods of intestate or testate persons, but hath given it, according to the exigence of the case, as the last and extraordinary resource of those, who are called to the successions of testates or intestates, by any particular law, decree of the senate, or new constitution.*

De successorio edicto.

§ IV. Cum igitur plures species successionum prætor introduxisset,

§ 4. *The prætor, having introduced in their order many kinds of suc-*

easque per ordinem disposuisset, et in unaquâque specie successionis sæpè plures extent dispari gradu personæ, ne actiones creditorum differrentur, sed haberent, quos convenirent, et ne facilè in possessionem bonorum defuncti mitterentur, et eo modo sibi consulerent, ideò petendæ bonorum possessioni certum tempus præfinivit. Liberis itaque et parentibus, tam naturalibus quam adoptivis, in petenda bonorum posssessione anni spatium, cæteris autem (agnatis vel cognatis) centum dierum, dedit.

cessions, and as persons of different degrees are often found in one species of succession, he thought fit to limit a certain time for demanding the possession of goods, that the actions of creditors may not be delayed for want of a proper person against whom to bring them, and that the creditors may not possess themselves of the effects of the deceased too easily, and consult solely their own advantage: therefore to parents and children, whether natural or adopted, he hath allowed one year, within which they may either accept or refuse the possession. To all other persons, agnates *or* cognates, *he allows only an hundred days.*

De jure accrescendi et iterum de successorio edicto.

§ V. Et si intra hoc tempus aliquis bonorum possessionem non petierit, ejusdem gradus personis accrescit; vel, si nullus sit, deinceps cæteris bonorum possessionem perindè ex successorio edicto pollicetur, ac si is, qui præcedebat, ex eo numero non esset. Si quis itaque delatam sibi bonorum possessionem repudiaverit, non, quousque tempus bonorum possessioni præfinitum excesserit, expectatur; sed statim cæteri ex eodem edicto admittuntur.

§ 5. *And, if a person intitled, do not claim possession within the time limited, his right of possession accrues first to those in the same degree with himself; and, in default of those, the prætor by* successory edict *gives the possession to the next degree, as if he, who preceded, had no right. If a man refuse the possession of goods, when it is open to him, there is no necessity to wait, until the time limited is expired, but the next in succession, may be instantly admitted under that* edict.

Explicatio dicti temporis.

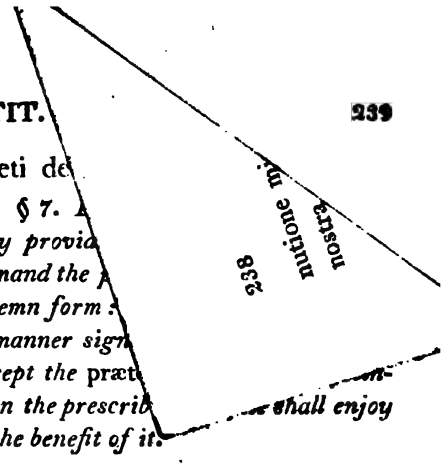
§ VI. In petendâ autem bonorum possessione dies utiles singuli considerantur.

§ 6. *In applications for the possession of goods, we count all the days, which are* utiles; *i. e. those days, on which the party, having knowledge that the inheritance is open to him, might apply to the judge.*

Quomodo peti de

§ VII. Sed benè anteriores principes et huic causæ providerunt, ne quis pro petenda bonorum possessione curet; sed, quocunque modo admittentis eam, indicium ostenderit, intra statuta tamen tempora, plenum habeat earum beneficium.

§ 7. A
ly provid
mand the
lemn form
manner sign
cept the præt
in the prescrib
the benefit of it.



TITULUS UNDECIMUS.

DE ACQUISITIONE PER ARROGATIONEM.

Continuatio.

EST et alterius generis per universitatem successio; quæ neque lege duodecim tabularum, neque prætoris edicto, sed eo jure, quod consensu receptum est, introducta est.

There is also an universal succession of another kind, introduced neither by the laws of the twelve tables, nor by the edict of the prætor, but by the law founded on general consent and usage.

Quæ hoc modo acquiruntur. Jus vetus.

§ I. Ecce enim, cum pater-familias sese in arrogationem dat, omnes res ejus corporales et incorporales, quæque ei debitæ sunt, arrogatori antea quidem pleno jure acquirebantur, exceptis iis, quæ per capitis diminutionem pereunt; quales sunt operarum obligationes et jus agnationis: usus etenim et ususfructus, licèt his antea connumerabantur; attamèn capitis dimi-

§ 1. *For example, if the father of a family gave himself in arrogation, his property corporeal or incorporeal, and the debts due to him, were formerly acquired in full right by the* arrogator; *those things only excepted, which perished by* diminution *or change of state; as the duties of freed-men to their patrons and the rights of* agnation. *But although use and usufruct, were heretofore*

easque penitùs eos tolli prohibuit in [illegible] constitutio.

numbered among those rights which perished by diminution, yet our constitution hath prohibited them from being taken away by the less diminution.

Jus novum.

§ II. Nunc autem nos eandem acquisitionem, quæ per arrogationem fiebat, coarctavimus ad similitudinem naturalium parentum. Nihil enim aliud, nisi tantummodò ususfructus, tam naturalibus parentibus quam adoptivis, per filios-familias acquiritur in iis rebus, quæ extrinsecûs filiis obveniunt, dominio eis integro servato. Mortuo autem filio arrogato in adoptivâ familiâ, etiam dominium rerum ejus ad arrogatorem pertransit; nisi supersint aliæ personæ, quæ ex constitutione nostrâ patrem in iis, quæ acquiri non possunt, antecedant.

§ 2. *But we have now limited the acquisitions from arrogation, by those of natural parentage: for nothing is now acquired either by natural or adoptive parents, but the bare usufruct of those things, which their children possess extrinsically in their own right: the property still remaining intire (in the adopted or natural child.) But, if an arrogated son die under power of his arrogator, then even the* property *of the effects of such son will pass to the* arrogator *in default of those persons, whom we have by our constitution preferred to the father in the succession of those things, which could not be acquired for him.*

Effectus hujus acquisitionis.

§ III. Sed ex diverso, pro eo quod is debuit, qui se in adoptionem dedit, ipso quidem jure arrogator non tenetur, sed nomine filii convenitur; et, si noluerit eum defendere, permittitur creditoribus, per competentes nostros magistratûs, bona, quæ ejus cum usufructu futura fuissent, si se alieno juri non subjecisset, possidere, et legitimo modo ea disponere.

§ 3. *On the other hand an* arrogator *is not directly bound to satisfy the debts of his adopted son; but he may be sued in his son's name; and, if he refuse to defend his son, then the creditors, by order of the proper magistrates, may seize upon and legally sell all those goods, of which the usufruct, as well as the property, would have been in the debtor, if he had not made himself subject to the power of another.*

TITULUS DUODECIMUS.

DE EO, CUI LIBERTATIS CAUSA BONA ADDICUNTUR.

Continuatio.

Accessit novus casus successionis ex constitutione Divi Marci. Nam, si ii, qui libertatem acceperunt à domino in testamento, ex quo non aditur hæreditas, velint bona sibi addici libertatum conservandarum causâ, audiuntur.

A new species of succession hath taken its rise from the constitution of Marcus Aurelius. *For, if those slaves, to whom freedom hath been bequeathed, are desirous, for the sake of obtaining it, that the inheritance, which hath not been accepted by the written heir, should be adjudged for their benefit, they shall obtain their request.*

Rescriptum D. Marci.

§ I. Et ita Divi Marci rescripto ad Pompilium Rufum continetur: verba rescripti ita se habent. *Si Virginio Valenti, qui testamento suo libertatem quibusdam adscripsit, nemine successore ab intestato existente, in ea causa bona ejus esse cœperunt, ut vœnire debeant, is, cujus de ea re notio est, aditus rationem desiderii tui habebit, ut libertatum, tam earum, quæ directo, quam earum, quæ per speciem fideicommissi relictæ sunt, tuendarum gratia addicantur tibi, si idonee creditoribus caveris de solido, quod cuique debetur, solvendo. Et ii quidem, quibus directa libertas data est, perinde liberi erunt, ac si hæreditas adita esset: ii autem, quos hæres manumittere rogatus est, a te libertatem consequentur; ita autem ut si non alia conditione velis tibi bona addici, quam ut ii etiam, qui di-*

§ 1. *And to the same effect is the rescript of the* emperor Marcus *to* Pompilius Rufus; *the words of which are* " If the estate of *Virginius Va-* " *lens*, who by testament hath be- " queathed to certain persons their " freedom, must necessarily be sold, " and there is no successor *ab intes-* " *tato*, then the magistrate who has " the cognizance of these affairs, " shall upon application hear the " merits of your cause, that, for " the sake of preserving the liberty " of those, to whom it was given ei- " ther directly or in trust, the es- " tate of the deceased may be ad- " judged to you, on condition, that " you give good security to satisfy " the creditors. And all those, to " whom freedom was *directly* gi- " ven, shall then become free, as if " the inheritance had been entered

recto libertatem acceperunt, tui liberti fiant: nam huic etiam voluntati tuæ, si ii, quorum de statu agitur, consentiant, auctoritatem nostram accommodamus. Et, ne hujus rescriptionis nostræ emolumentum alia ratione irritum fiat, si fiscus bona agnoscere voluerit, et ii, qui bonis nostris attendunt, sciant, commodo pecuniario præferendum esse libertatis causam, et ita bona cogenda, ut libertas eis salva sit, qui eam adipisci potuerunt, ac si hæreditas ex testamento adita esset.

" upon by the written heir; but " those whom the heir was order- " ed to manumit, shall obtain their " freedom from you only. And, " if you are not willing, that the " goods of the deceased should be " adjudged to you on any other con- " dition, than that even they, who " received their liberty *directly* by " testament, shall also become your " freed-men, we then order, that " your will shall be complied with, " if the persons agree to it, who are " to receive their freedom. And, " lest the use and emolument of this " our *rescript* should be frustrated " by any other means, be it known " to the officers of our revenue, " that, whenever our exchequer " lays claim to the estate of a de- " ceased person, the cause of liber- " ty is to be preferred to any pe- " cuniary advantage; and the es- " tate shall be so seized, as to pre- " serve the freedom of those, who " could otherwise have obtained it: " and this in as full a manner, as if " the inheritance had been entered " upon by the testamentary heir."

Utilitas rescripti.

§ II. Hoc rescripto subventum est et libertatibus et defunctis, ne bona eorum à creditoribus possideantur et væneant. Certè, si fuerint hac de causâ bona addicta, cessat bonorum venditio; existit enim de-

§ 2. *This* rescript *is calculated in favour of liberty, and also for the benefit of deceased persons, lest their effects should be seized and sold by their creditors: for it is certain, that, when goods are adjudged to a*

functi defensor, et quidem idoneus; qui de solido creditoribus cavet.

particular man for the preservation of liberty, a sale by creditors can never take effect: for he, to whom the goods are adjudged, is the protector of the deceased, and must be a person, who can give security to the creditors.

Ubi locum habeat.

§ III. In primis hoc rescriptum toties locum habet, quóties testamento libertates datæ sunt. Quid ergò, si quis intestatus decedens codicillis libertates dederit, neque adita sit ab intestato hæreditas? Favor constitutionis debebit locum habere: certè, si testatus decesserit et codicillis dederit libertatem, competere eam, nemini dubium est.

§ 3. *This* rescript *takes place, whenever freedom is conferred by testament. But, what if a master die intestate, having bequeathed freedom to his slaves by codicil, and his inheritance be not entered upon? We answer, that the benefit of the* rescript *shall extend to this case; most certainly, if a master die testate, and by codicil bequeath freedom, the* rescript *shall be in force.*

§ IV. Tunc enim constitutioni locum esse verba ostendunt, cum nemo successor ab intestato existat: ergò, quamdiu incertum erit, utrum existat, an non, cessabit constitutio. Si verò certum esse cœperit, neminem existere; tunc erit constitutioni locus.

§ 4. *The words of the* rescript *shew, that it is in force, when there is no successor* ab intestato. *Therefore while it remains doubtful, whether there be or be not a successor, the constitution shall not take place; but when it is certain that no one will enter upon the succession, it shall then have its effect.*

§ V. Si is, qui in integrum restitui potest, abstinuerit hæreditate, an, quamvis potest in integrum restitui, potest admitti constitutio, et bonorum addictio fieri? Quid ergò, si post addictionem, libertatum, conservandarum causâ factam, in integrum sit restitutus? Utique

§ 5. *But, if one who has a right to be restored* in integrum *(as a minor) should delay to take upon him the inheritance, shall the constitution then take place, and an adjudication of the goods pass (to a stranger or one of the slaves?) And again, after an adjudication has been made for the*

non erit dicendum, revocari libertates ; quia semel competierunt.

sake of liberty, shall the heir be restored in integrum ? *We answer, that freedom once obtained, shall not afterwards be revoked.*

Si libertates datæ non sunt.

§ VI. Hæc constitutio libertatum tuendarum causâ introducta est ; ergò, si libertates nullæ sint datæ, cessat constitutio. Quid ergò, si vivus dederit libertates vel mortis causâ, et, ne de hoc quæratur, utrum in fraudem creditorum, an non, factum sit, idcircò velint sibi bona addici, an audiendi sunt ? Et magis est, ut audiri debeant, etsi deficiant verba constitutionis.

§ 6. *This constitution was made for the protection of liberty : and therefore, when freedom is not given, the constitution has no effect. Suppose then, a master hath given freedom to his slaves either* inter vivos, *or* mortis causâ, *and to prevent the creditors from complaining of fraud, they should petition, that the estate of the deceased may be adjudged to them ; are they to be heared ? we think they ought, although the letter of the constitution is deficient.*

De speciebus additis à Justiniano.

§ VII. Sed, cum multas divisiones ejusmodi constitutioni deesse perspeximus, lata est à nobis plenissima constitutio, in quâ multæ species collatæ sunt, quibus jus hujusmodi successionis plenissimum est effectum ; quas ex ipsius lectione constitutionis potest quis cognoscere.

§ 7. *But perceiving that the* rescript *was deficient in many respects, we enacted a very full constitution, containg many cases, which amply explain the rights of succession ; which any person who reads that constitution, may understand.*

TITULUS DECIMUS-TERTIUS.

DE SUCCESSIONIBUS SUBLATIS, QUÆ FIEBANT PER BONORUM VENDITIONES, ET EX SENATUS-CONSULTO CLAUDIANO.

C. vii. T. 24.

ERANT ante prædictam successionem olim et aliæ per universitatem successiones; qualis fuerat bonorum emptio, quæ de bonis debitoris vendendis per multas ambages fuerat introducta; et tunc locum habebat, quando judicia ordinaria in usu fuerant; sed, cum extraordinariis judiciis posteritas usa est, ideò cum ipsis ordinariis judiciis etiam bonorum venditiones expiraverunt: et tantummodò creditoribus datur officio judicis bona possidere, et, prout utile eis visum est, ea disponere: quod ex latioribus digestorum libris perfectius apparebit. Erat et ex senatus-consulto Claudiano miserabilis per universitatem acquisitio, cum libera mulier, servili amore bacchata, ipsam libertatem per senatus-consultum amittebat, et cum, libertate substantiam. Quod indignum nostris temporibus esse existimantes, et à nostrâ civitate deleri, et non inseri nostris digestis concessimus.

There were many other kinds of universal succession before that, which we treated of in the foregoing title; as the bonorum emptio; *which was introduced with many intricacies for the sale of debtor's estates, and continued as long as the ordinary judgments were in practice; but, when the extraordinary judgments were used, the* emptio bonorum *and the ordinary judgments ceased together. Creditors can now possess themselves of the goods of their debtors and dispose of them, as they think proper, by the decree of a judge. These points are treated of more at large in the books of our digests. There was also, by virtue of the* Claudian *decree, another universal acquisition called* miserabilis: *for example, if a free-woman had debased herself by cohabiting with a slave, she lost her freedom by the before named decree, and, together with her freedom, her estate and substance. But, this was, in our opinion, unworthy of our reign, and ought to be expunged; hence, we have not permitted it to be inserted in the digests.*

TITULUS DECIMUS-QUARTUS.

DE OBLIGATIONIBUS.

D. xliv. T. 7. C. iv. T. 10.

Continuatio et definitio.

NUNC transeamus ad obligationes. Obligatio est juris vinculum, quo necessitate astringimur alicujus rei solvendæ secundùm nostræ civitatis jura.

Let us now pass to obligations. An obligation is the chain of the law, by which we are necessarily bound to make some payment, according to the laws of our country.

Divisio prior.

§ I. Omnium autem obligationum summa divisio in duo genera deducitur; namque aut civiles sunt aut prætoriæ. Civiles sunt, quæ aut legibus constitutæ, aut certo jure civili comprobatæ sunt. Prætoriæ sunt, quas prætor ex suâ jurisdictione constituit; quæ etiam honorariæ vocantur.

§ 1. *Obligations are primarily divided into two kinds,* civil *and* prætorian. Civil *obligations, are such as are constituted by the laws, or by any species of the civil law.* Prætorian *obligations are such as the prætor hath appointed by his authority; and are also called* honorary.

Divisio posterior.

§ II. Sequens divisio in quatuor species dividitur. Aut enim ex contractu sunt, aut quasi ex contractu, aut ex maleficio, aut quasi ex maleficio. Prius est, ut de iis quæ ex contractu sunt, dispiciamus. Harum æque quatuor sunt species. Aut enim re contrahuntur, aut verbis, aut literis, aut consensu: de quibus singulis dispiciamus.

§ 2. *The second or subsequent division of obligations is four fold; by* contract, *by* quasi-contract; *by* malefeasance, *and by* quasi-malefeasance. *Let us first treat of those which arise from* contract; *which are also four fold: for obligations are contracted by the thing itself, by parol, by writing, or by consent of parties. Let us take a view of each of these.*

TITULUS DECIMUS-QUINTUS.

QUIBUS MODIS RE CONTRAHITUR OBLIGATIO.

D. xii. T. 1. D. xiii. T. 6. 7. C. iv. T. 1. 23. 24. 34.

De mutuo.

RE contrahitur obligatio, veluti mutui datione. Mutui autem datio in iis rebus consistit, quæ pondere, numero, mensurâve, constant; veluti vino, oleo, frumento, pecuniâ numeratâ, ære, argento, auro, quas res, aut numerando, aut metiendo, aut appendendo, in hoc damus, ut accipientium fiant. Et, quoniàm nobis non eædem res sed aliæ ejusdem naturæ et qualitatis redduntur, indè etiam mutuum appellatum est; quia ita à me tibi datur, ut ex meo tuum fiat: et ex eo contractu nascitur actio, quæ vocatur *certi condictio.*

An obligation may be founded on the thing itself; as by the delivery of a loan or mutuum: *and this may be of any thing, having weight, number, or measure, as wine, oil, corn, coin, brass, silver, or gold; which being thus delivered, become the property of the receiver: and since the identical things lent cannot, but others of the same nature must be returned in lieu of them, this loan is therefore called a* mutuum; *for for in this case* I so give, that what is mine may become yours: *From this contract arises the action,* certæ condictio.

De indebito soluto.

§ I. Is quoque, qui non debitum, accepit ab eo, qui per errorem solvit, re obligatur; daturque agenti contra eum propter repetitionem condictitia actio: nam perindè ei condici potest, *si apparet, eum dare oportere,* ac si mutuum accepisset. Undè pupillus, si ei sinè tutoris auctoritate indebitum per errorem datum est, non tenebitur indebiti condictione, non magis quam mutui datione. Sed hæc species obligationis non videtur ex contractu consistere; cum is, qui solvendi

§ 1. *He also to whom another hath paid by mistake what was not due, is bound by the thing received, so that an action of condiction lies for the recovery at the suit of him, who paid or delivered it erroneously. And this action may be brought* si apparet, eum dare opportere; *as if the receiver had accepted it as a* mutuum. *Hence a pupil, to whom a payment hath been erroneously made without the authority of his* tutor, *is not subject to the* condictio indebiti, *any more than to the* certi con-

animo dat, magis voluerit negotium distrahere, quam contrahere.

dictio. *And yet this species of obligation does not seem founded in contract; since he, who pays in contemplation of debt, appears more willing to dissolve, than to make a contract.*

De commodato.

§ II. Item is, cui res aliqua utenda datur, id est, commodatur, re obligatur, et tenetur commodati actione. Sed is ab eo, qui mutuum accepit, longè distat: namque non ita res datur, ut ejus fiat; et ob id de eâ re ipsa restituendâ tenetur. Et is quidem, qui mutuum accepit, si quolibet fortuito casu amiserit, quod accepit, veluti incendio, ruina, naufragio, aut latronum hostiumve incursu, nihilominùs obligatus manet. At is, qui utendum accepit, sanè quidem exactam diligentiam custodiendæ rei præstare tenetur: nec sufficit ei, tantam diligentiam adhibuisse, quantam suis rebus adhibere solitus est, si modò alius diligentior poterat eam rem custodire. Sed propter majorem vim, majoresve casus, non tenetur, si modò non ipsius culpâ is casus intervenerit: alioquì si id, quod tibi commodatum est domi, peregrè tecum ferre malueris, et vel incursu hostium prædonumve, vel naufragio, amiseris, dubium non est, quin de restituendâ eâ re tenearis. Commodata autem res tunc propriè intelligitur, si nullâ mercede acceptâ vel constitutâ, res tibi utenda data est: alioqui, mercede intervenìente, locatus tibi usus rei vide-

§ 2. *He also, to whom the use of any particular thing is granted or* commodated, *is bound by the delivery of the thing, and is subject to the action* commodataria. *But such person widely differs from him, who hath received a* mutuum: *for a* commodatum, *or thing lent, is not delivered, to the intent that it should become the property of the receiver; and therefore he is bound to restore the identical thing received. There is also another difference; for he who hath accepted a* mutuum, *is not freed from his obligation, if by any accident, as the fall of an edifice, fire, shipwreck, thieves, or the incursions of an enemy, he hath lost what he received: but he, who hath received a* commodatum, *or a thing lent for his use only, is indeed commanded to employ his utmost diligence in keeping and preserving it; and it will not suffice, that he hath taken the same care of it, which he was accustomed to take of his own property, if it appear, that a more diligent man might have preserved it; yet, if the loss was occasioned by superior force, or some extraordinary accident, and not by any fault, he is then not obliged to make it good; but if a man chuse to travel abroad, with that*

tur; gratuitum enim debet esse commodatum.

which hath been lent him at home, and should lose it by shipwreck, or the incursion of enemies, or robbers, it is not doubted, but he is bound to make restitution, or pay an equivalent. A thing is properly said to be lent or commodated, *when one man permits another to enjoy the use of it, and receives nothing by way of hire: otherwise the thing is let, and not lent; for a* commodatum, *or loan, must be gratuitous.*

De deposito.

§ III. Præterea et is, apud quem res aliqua deponitur, re obligatur, teneturque actione depositi; quia et ipse de eâ re, quam accepit, restituendâ tenetur. Sed is ex eo solo tenetur, si quid dolo commiserit: culpæ autem nomine, id est, desidiæ ac negligentiæ, non tenetur. Itaque securus est, qui parùm diligentèr custoditam rem furto amiserit: quia, qui negligenti amico rem custodiendam tradit, non ei, sed suæ facilitati, id imputare debet.

§ 3. *A person intrusted with a deposit, is bound by the delivery of the thing, and is subject to an action of deposit, because he is under an obligation of making restitution of that very thing, which he received. But a depositary is only thus answerable on account of fraud; for where a fault only can be proved against him, such as negligence, he is under no obligation; and he is therefore secure, if the thing deposited be stolen from him, even although it were carelessly kept. For he, who commits his goods to the care of a negligent friend, should impute the loss, not to his friend, but to his own want of caution.*

De pignore.

§ IV. Creditor quoque, qui pignus accepit, re obligatur; quia et ipse, de eâ re, quam accepit, restituendâ, tenetur actione pigneratitiâ. Sed, quia pignus utriusque gratiâ datur, et debitoris, quo magis pecunia ei credatur, et creditoris,

§ 4. *A creditor also, who hath received a pledge, is bound by the delivery of it; for he is obliged to restore the very thing, which he hath received, by the action called* pigneratitia. *But, inasmuch as a pledge is given for the mutual service of both*

quo magis ei in tuto sit creditum, placuit sufficere, si, ad eam rem custodiendam, exactam diligentiam adhibeat; quam si præstiterit, et aliquo fortuito casu rem amiserit, securum esse, nec impediri creditum petere.

debtor and creditor, (of the debtor, that he may borrow more readily, and of the creditor, that repayment may be better secured,) it will suffice, if the creditor shall appear to have used an exact diligence in keeping the thing pledged: for if so, and the pledge be lost by mere accident, the creditor is secure, and is not prohibited from suing his debt.

TITULUS DECIMUS-SEXTUS.

DE VERBORUM OBLIGATIONIBUS.

D. xlv. T. 1. C. viii. T. 38.

Summa.

VERBIS obligatio contrahitur ex interrogatione et responsione, cum quid dari fierive nobis stipulamur; ex quâ duæ proficiscuntur actiones, tam condictio certi, si certa sit stipulatio, quam ex stipulatu, si incerta sit: quæ hoc nomine inde utitur, quod stipulum apud veteres firmum appellabatur, forte â stipite descendens.

A verbal obligation is made by question and answer, when we stipulate, that any thing shall be given or done; hence arise two actions, viz. the condictio certi, *when the stipulation is certain; and the* condictio ex stipulatu, *when it is uncertain. This obligation is called a stipulation, because whatever was firm, was termed* stipulum, *by the ancients; probably from* stipes, *the trunk of a tree.*

De verbis stipulationum.

§ I. In hac re olim talia verba tradita fuerunt; *Spondes? Spondeo. Promittis? Promitto. Fide-promittis? Fide-promitto. Fide-jubes? Fide-jubeo. Dabis? Dabo. Facies? Faciam.* Utrum autem Latinâ an Græcâ, vel qualibet aliâ,

§ 1. *The following words were formerly used in all verbal obligations.*

Do you undertake?	Spondes? Spondeo.
Do you promise?	Promittis? Promitto.

linguâ stipulatio concipiatur, nihil interest; scilicèt, si uterque stipulantium intellectum ejus linguæ habeat: nec necesse est eâdem linguâ utrumque uti, sed sufficit congruentèr ad interrogata respondere. Quinetiam duo Græci Latinâ linguâ contrahere obligationem possunt. Sed hæc solemnia verba olim quidem in usu fuerunt; postea autem Leonina constitutio lata est, quæ, solemnitate verborum sublata, sensum et consonantem intellectum ab uràque, parte solùm desiderat, quibuscunque tandem verbis expressum est.

Do you faithfully promise? Fide-promittis? Fide-promitto.
Do you pledge yourself? Fide-jubes? Fide-jubeo.
Will you deliver? Dabis? Dabo.
Will you perform? Facies? Faciam.

And it is not material whether the stipulation be conceived in Latin, Greek, or any other language, if the parties understand it: nor is it necessary that the same language should be used by each person; for it is sufficient, if a pertinent answer be made to each question. So two Greeks may contract in Latin. Anciently indeed it was necessary to use those solemn words before recited; but the constitution of the emperor Leo *was afterwards enacted, which takes away this verbal solemnity, and requires only the apprehension and consent of each party, expressed in any form of words.*

Quibus modis stipulatio fit. De stipulatione pura vel in diem.

§ II. Omnis stipulatio aut in diem, aut sub conditione fit. Purè, veluti *quinque* AUREOS *dare spondes?* idque confestim peti potest. In diem, cum adjecto diè, quo pecunia solvatur, stipulatio fit; veluti, *decem* AUREOS *primis calendis Martiis dare spondes?* id autem, quod in diem stipulamur, statim quidem debetur; sed peti prius, quam dies venerit, non potest; ac ne eo quidem ipso die, in quem stipulatio facta est, peti potest; quia totus is dies arbitrio solventis tribui debet; neque enim cer-

§ 2. *Every stipulation is made to be performed* simply, *or at a* day certain, *or* conditionally. Simply, *when a man says* do you promise to pay five AUREI? *and, in this case, the money may be instantly demanded.* At a day certain, *as when the day is mentioned on which the money is to be paid; thus,* do you promise to pay me five AUREI on the first of March? *but that which we stipulate to pay at a* day certain, *though it become immediately due, cannot be demanded before the day comes; nor can it even then be sued; for*

tum est, eo die, in quem promissum est, datum non esse, priusquam is dies præterierit.

the whole day must be allowed for payment; because it can never be certain, that there hath been a failure of payment on the day promised, until that day be expired.

De die adjecto perimendæ obligationes causa.

§ III. At, si ita stipuleris, *decem* AUREOS *annuos, quoad vivam, dare spondes?* et purè facta obligatio intelligitur, et perpetuatur: quia ad tempus non potest deberi; sed hæres petendo pacti exceptione submovebitur.

§ 3. *But, if a man thus stipulates; viz.* do you promise to give me ten AUREI annually, as long as I live? *the obligation is understood to be made simply, and becomes perpetuated; for it cannot remain due for a given time only: but should the heir demand payment, he shall be barred by an exception of agreement.*

De conditione.

§ IV. Sub conditione stipulatio fit, cum in aliquem casum differtur obligatio, ut, si aliquid factum fuerit, vel non fuerit, committatur stipulatio; veluti, *si Titius consul fuerit factus, quinque* AUREOS *dare spondes?* Si quis ita stipuletur, *si in capitolium non ascendero, dare spondes?* perindè erit, ac si stipulatus esset, cum moreretur, sibi dari. Ex conditionali stipulatione tantùm spes est debitum iri; eamque ipsam spem in hæredem transmittimus, si prius, quam conditio extet, mors nobis contigerit.

§ 4. *A stipulation is conditional, when an obligation is referred to an accident, and depends upon some thing to happen or not to happen, before the stipulation can take effect: for instance,* do you promise to pay me five AUREI, if Titius be made consul? *or* do you promise to pay me five AUREI, if I do not ascend the capitol? *which last stipulation is in effect the same, as if he had stipulated, that five* AUREI *should be paid to him at the time of his death. It is to be observed, that, in every conditional stipulation, there is only a hope, that the thing stipulated will become due; and this hope a man transmits to his heirs, if he die before the event of the condition.*

De loco.

§ V. Loca etiam inseri stipulationi solent; veluti, *Carthagini dare spondes?* quæ stipulatio, licèt purè fieri videatur, tamèn re ipsa habet tempus adjectum, quo promissor utatur ad pecuniam Carthagini dandam. Et ideò, si quis Romæ ita stipuletur, *hodie Carthagini dare spondes?* inutilis erit stipulatio, cum impossibilis sit repromissio.

§ 5. *Even places are often inserted in a stipulation; as*, do you promise to give me such a particular thing at Carthage? *and this stipulation, although it appear to be made simply, yet in reality carries with it a space of time, which the obligor may make use of to enable himself to pay the money promised at* Carthage. *And therefore, if a man at* Rome *should stipulate in these words*, do you promise to pay me a sum of money this day at Carthage? *the stipulation would be null, because the performance of it would be impossible.*

De conditione ad tempus præsens vel præteritum relata.

§ VI. Conditiones, quæ ad præsens vel præteritum tempus referuntur, aut statim infirmant obligationem, aut omninò non differunt; veluti, *si Titius consul fuit*, vel, *si Mævius vivit, dare spondes?* nam, si ea ita non sunt, nihil valet stipulatio: sin autem ita se habent, statim valet. Quæ enim per rerum naturam sunt certa, non morantur obligationem, licet apud nos incerta sint.

§ 6. *Conditions, which relate to the time present or past, either instantly annul or enforce an obligation. Thus*, do you promise if TITIUS hath been a consul? or if MÆVIUS be now living? *If these are not facts, the stipulation is void; if they are, it is good and may be enforced; for events, which in themselves are certain, delay not the performance of an obligation, although to us they are not certain.*

Quæ in stipulatum deducuntur.

§ VII. Non solùm res in stipulatum deduci possunt, sed etiam factà; ut si stipulemur aliquid fieri, vel non fieri. Et in hujusmodi stipulationibus optimum erit pœnam subjicere, ne quantitas stipulationis in incerto sit, ac necesse sit

§ 7. *Not only things, but acts, may be the subject of stipulation; as when we stipulate, that something shall, or shall not be done. And, in these stipulations, it will be right to subjoin a penalty, lest the value of the stipulation should be incertain,*

actori probare, quod ejus intersit. Itaque, si quis, ut fiat aliquid, stipuletur, ita adjici pœna bebet, *si ita factum non erit, pœnæ nomine decem aureos dare spondes?* Sed si, quædam fieri, quædam non fieri, unâ eâdemque conceptione stipuletur quis, clausula hujusmodi erit adjicienda; *si adversus ea factum erit, sive quid ita factum non fuerit, tunc pœnæ nomine decem aureos dare spondes?*

and the demandant should therefore be forced to prove how far he is interested in it. Therefore, if a man stipulate, that something shall be done, a penalty ought to be thus added; do you not promise to pay me ten AUREI, as a penalty, if the act stipulated is not performed? *But, if it be agreed in the same obligation, that some things shall be done, and that others shall not be done, then ought some such clause, as the following, to be added;* do you promise to pay me ten AUREI, as a penalty, if any thing be done contrary to agreement; or if any thing be not done according to our agreement?

TITULUS DECIMUS-SEPTIMUS.

DE DUOBUS REIS STIPULANDI ET PROMITTENDI.

D. xlv. T. 2. C. viii. T. 40. Nov. 99.

Quibus modis duo rei fieri possunt.

ET stipulandi et promittendi duo pluresve rei fieri possunt. Stipulandi ita, si post omnium interrogationem promissor respondeat, *Spondeo;* ut puta, cum duobus separatim stipulantibus ita promissor respondeat, *utrique vestrum dare spondeo.* Nam, si prius Titio sponderit, deindè alio interrogante spondeat, alia atque alia erit obligatio, nec creduntur duo rei stipulan-

Two or more persons may stipulate, and two or more may become obligors. The stipulating parties are bound, if, after all questions have been asked, the obligor answer, I promise; *as when, for example, the obligor thus answers two persons separately stipulating,* I promise to pay each of you. *For, if he first promise* Titius, *and afterwards promise another, who interrogates him,*

di esse. Duo pluresve rei promittendi ita fiunt, *Mævi, decem aureos dare spondes? et, Sei, eosdem decem aureos dare spondes?* si respondeant singuli separatim, *Spondeo.*

there will then be two obligations, and not two stipulators to one obligation. Two or more become obligors, if, after they have been thus interrogated, MÆVIUS, do you promise to pay us ten AUREI? and, SEIUS, do you promise to pay us the same ten AUREI? *they each of them answer separately,* I do promise.

De effectu hujusmodi stipulationum.

I. Ex hujusmodi obligationibus et stipulationibus solidum singulis debetur, et promittentes singuli in solidum tenentur. In utrâque tamen obligatione una res vertitur; et vel alter debitum accipiendo, vel alter solvendo, omnium perimit obligationem, et omnes liberat.

§ 1. *By these stipulations and obligations the whole sum stipulated becomes due to each stipulator; and each obligor is bound for the whole. But as one and the same thing is due by each obligation, any one stipulator by receiving the debt, and any obligor by paying it, discharges the obligation of the rest, and frees all parties.*

De stipulatione purâ; et de die et conditione.

§ II. Ex duobus reis promittendi, alius purè, alius in diem, vel sub conditione, obligari potest; nec impedimento erit dies aut conditio, quo minùs ab eo, qui pure obligatus est, petatur.

§ 2. *Where there are two obligors, the one may bind himself purely and simply, and the other may oblige himself only to make payment on a day certain, or upon condition: but neither the day certain, nor the condition, will secure the person, who is simply bound, from being sued for the payment of the whole.*

TITULUS DECIMUS-OCTAVUS.

DE STIPULATIONIBUS SERVORUM.

D. xlv. T. 3.

An servus stipulari possit.

SERVUS ex personâ domini jus stipulandi habet; sed et hæreditas in plerisque personæ defuncti vicem sustinet: ideòque, quod servus hæreditarius antè adîtam hæreditatem stipulatur, acquirit hæreditati; ac per hoc etiam hæredi postea facto acquiritur.

A slave obtains the liberty of stipulating from the person of his master; but in many instances the inheritance represents the person of a master deceased: and therefore whatever an hereditary slave stipulates for, before the inheritance is entered upon, he acquires it for the inheritance; and of course for him, who afterwards becomes the heir.

Cui acquirat. De personâ, cui stipulatur. De stipulatione impersonali.

§ I. Sivè autem domino, sivè sibi, sivè conservo, suo, sivè impersonalitèr servus stipuletur, domino acquirit. Idem juris est et in liberis, qui in potestate patris sunt, ex quibus causis acquirere possunt.

§ 1. A slave, let him stipulate how he will, for his master, for himself, for a fellow slave, or generally without naming any person, always acquires for his master. And the same obtains among children, who are under the power of their father, in regard to those things, which they can acquire for him.

De stipulatione facti.

§ II. Sed, cum factum in stipulatione continebitur, omnimodò persona stipulantis continetur; veluti, si servus stipuletur, ut sibi ire, agere, liceat; ipse enim tantùm prohiberi non debet, non etiam dominus ejus.

§ 2. But, when a fact or thing to be done is contained in a stipulation, the person of the stipulator is solely regarded; so that, if even a slave stipulate, that he should be permitted to pass through a field, and to drive beasts or a carriage through it, it is not the master, but the slave only, who is to be permitted to pass.

De servo communi.

§ III. Servus communis stipulando unicuique dominorum, pro portione dominii, acquirit; nisi jussu unius eorum, aut nominatim alicui eorum, stipulatus est; tunc enim soli ei acquiritur. Quod servus communis stipulatur, si alteri ex dominis acquiri non potest, solidum alteri acquiritur; veluti si res, quam dari stipulatus est, unius domini sit.

§ 3. *If a slave, who is in common to several masters, stipulate, he acquires a share for each master according to the proportion, which each has in the property of him. But if such slave should stipulate at the command of any particular master, or in his name, the thing stipulated will be acquired solely for that master. And, whatever a slave in common to two masters stipulates for, if part cannot be acquired for one master, the whole shall be acquired for the other; as when the thing stipulated already belongs to one of the two.*

TITULUS DECIMUS-NONUS.

DE DIVISIONE STIPULATIONUM.

Divisio.

STIPULATIONUM aliæ sunt judiciales, aliæ prætoriæ, aliæ conventionales, aliæ communes, tam prætoriæ quam judiciales.

Some stipulations are judicial, *others* prætorian, *others* conventional, *and others* common; *that is, hath* prætorian *and* judicial.

De judicialibus stipulationibus.

§ I. Judiciales sunt duntaxàt, quæ à mero judicis officio proficiscuntur; veluti de dolo cautio, vel de persequendo servo, qui in fugâ est, restituendove pretio.

§ 1. *The* judicial *are those, which proceed merely from the office of the judge; as when security is ordered to be given against fraud, or for pursuing a slave, who hath fled, or for paying the price of him.*

De prætoriis.

§ II. Prætoriæ sunt, quæ à mero prætoris officio proficiscuntur; veluti damni infecti vel legatorum. Prætorias autem stipulationes sic audiri oportet, ut in iis etiam contineantur Ædilitiæ; nam et hæ à jurisdictione prætoris veniunt.

§ 2. Prætorian *stipulations are those, which proceed from the mere office of the prætor; as when security is ordered* pro damno infecto; *for damage likely to happen; or for the payment of legacies. Under* prætorian *stipulations are comprehended the* Edilitian; *for these proceed from the jurisdiction of the prætor.*

De conventionalibus.

§ III. Conventionales sunt, quæ ex conventione utriusque partis concipiuntur; hoc est, neque jussu judicis, neque jussu prætoris, sed ex conventione contrahentium; quarum totidem sunt genera, quot, (penè dixerim,) rerum contrahendarum.

§ 3. Conventional *stipulations are those, which are made by the agreement of parties; that is, neither by order of a judge or prætor, but by the consent of the persons contracting; and of these stipulations there are as many kinds, as of things to be contracted for.*

De communibus.

§ IV. Communes sunt, veluti ram salvam fore pupillo, (nam et prætor jubet rem salvam fore pupillo caveri, et interdùm judex, si aliter hæc res expediri non potest,) vel de rato stipulatio.

§ 4. Common *stipulations are those, which are ordered for the security of the effects of the pupil, (for the prætor ordains a caution to be given on this account, and sometimes a judge decrees it, when there is an absolute necessity,) or for the ratification of a thing done in another's name.*

TITULUS VIGESIMUS.

DE INUTILIBUS STIPULATIONIBUS.

C. viii. T. 39.

De his, quæ sunt in commercio.

OMNIS res, quæ dominio nostro subjicitur, in stipulationem deduci potest, sivè ea mobilis sit, sivè soli.

Every thing, of which we have the property, may be brought into stipulation, whether it be moveable or immoveable.

De his, quæ non existunt.

§ I. At si quis rem, quæ in rerum naturâ non est, aut esse non potest, dari stipulatus fuerit, veluti Stichum, qui mortuus sit, quem vivere credebat, aut Hippocentaurum, qui esse non possit, inutilis erit stipulatio.

§ 1. But, if a man hath stipulated that a thing shall be given, which does not, or cannot exist, as that Stichus, *the slave, who is dead, but is thought to be living, or that a Centaur, who cannot exist, should be given to him, the stipulation is of no force.*

De his, quæ non sunt in commercio.

§ II. Idem juris est, si rem sacram aut religiosam, quam humani juris esse credebat, vel publicam, quæ usibus populi perpetuò exposita sit, ut forum, vel theatrum, vel liberum hominem, quem servum esse credebat, vel cujus commercium non habuerit, vel rem suam dari, quis stipuletur: nec in pendenti erit stipulatio ob id, quod publica res in privatam deduci, et ex libero servus fieri potest, et commercium adipisci stipulator potest; sed protinùs inutilis est. Item contrà, licèt initio utilitèr res in stipulatum deducta sit, si tamen postea in aliquam eorum causam, de

§ 2. And the law is the same, if a thing sacred, which was deemed otherwise, is brought into stipulation; or some thing of constant public use, as a forum or a theatre; or a free person, thought to be bond; or what cannot be acquired; or some thing which is already his own: nor shall any such stipulation continue in suspense, because a thing public may become private, a freeman may turn slave, a stipulator may become capable of acquiring, or because what now belongs to the stipulator may cease to be his; but every such stipulation shall be instantly void. And, on the contrary, although a

quibus supra dictum est, sinè facto promissoris devenerit, extinguitur stipulatio. At nec statim ab initio talis stipulatio valebit, *Lucium Titium, cum servus erit, dare spondes?* et similia: quæ enim naturâ sui dominio nostro exempta sunt, in obligationem deduci nullo modo possunt.

thing may properly be brought into stipulation at first, yet, if it afterwards fall under the class of any of the things before mentioned without the fault of the obligor, the stipulation is extinguished. And such a stipulation, as the following shall never be valid: do you promise to give me LUCIUS TITIUS, when he shall become a slave? *for those things, which in their natures are exempt from our dominion, are by no means to be brought into obligation.*

De facto vel datione alterius.

§ III. Si quis alium daturum facturumve quid promiserit, non obligabitur; veluti si spondeat, Titium quinque aureos daturum: quod si effecturum se, ut Titius daret, spoponderit, obligatur.

§ 3. *If a man promise, that another shall give or do something, such promissor shall not be bound; as if a man should promise,* that TITIUS shall pay five AUREI: *but, if he promise, that he will* cause TITIUS *to pay five* AUREI, *his promise shall be binding.*

De eo, in quem confertur obligatio, vel solutio.

§ IV. Si quis alii, quam ei, cujus juri subjectus est, stipuletur, nihil agit. Planè solutio etiam in extraneam personam conferri potest; veluti, si quis ita stipuletur, *mihi aut* SEIO *dare spondes?* ut obligatio quidem stipulatori acquiratur, solvi tamen Seio, etiam invito eo, rectè possit, ut liberatio ipso jure contingat; sed ille adversus Seium habeat mandati actionem. Quod si quis sibi et alii, cujus juri subjectus non sit, dari decem AUREOS stipulatus est, valet quidem stipulatio. Sed, utrum totum de-

§ 4. *If a man stipulate for any other, than for him, to whom he is subject, it is void: yet a payment of a thing promised may be made to a stranger; as if a man should stipulate,* do you promise to make payment to me, or to SEIUS? *for, when the obligation is to the stipulator, the payment may well be made to* Seius, *though against his will; and this is allowed in favor of the debtor, that he may be legally freed from his debt: and the stipulator, if there be occasion, may have an action of mandate against* Seius. *If a man should*

beatur stipulatori, quod in stipulationem deductum est, an ve ro pars dimidia, dubitatum est. Sed, placuit, non plus, quam dimidiam partem, ei acquiri. Ei verò, qui juri tuo subjectus est, si stipulatus sis, tibi acquiris; quia vox tua tanquam filii intelligitur in his rebus, quæ tibi acquiri possunt.

stipulate, that ten AUREI *shall be paid to him and to another, not under his power, the stipulation would be good: yet it hath been a doubt, whether in this case, the whole sum would be due to the stipulator, or only a moiety; and it hath been resolved, a moiety only. But, if you stipulate for another, who is subject to your power, you acquire for yourself: for your own words are reputed your son's, and your son's words are reputed yours, as so to all those things, which you may acquire.*

De interrogatione et responsione.

§ V. Præterea inutilis est stipulatio, si quis ad ea, quæ interrogatus fuerit, non respondeat; veluti si quis decem aureos à te dari sibi stipuletur, tu quinque promittas, vel contra: aut si ille purè stipuletur, tu sub conditione promittas, vel contrà: si modo scilicèt id exprimas; id est, si cui sub conditione vel in diem stipulanti tu respondeas, *præsenti die spondeo:* nam, si hoc solùm respondeas, *Promitto*, brevitèr videris in eandem diem vel conditionem spopondisse: neque enim necesse est in respondendo, eadem omnia repeti, quæ stipulator expresserit.

§ 5. *A stipulation is void, if the party interrogated do not answer pertinently to the demand made; as when a person stipulates, that ten* aurei *shall be paid him, and you answer five; or,* vice versa, *if he stipulate for five, and you answer,* I promise ten. *A stipulation is also void, if a man stipulates simply, and you promise conditionally; or the contrary; that is, if, when a man is stipulating conditionally or at a day certain, you answer him thus;* I promise you payment on this present day. *But, if you answer only,* I promise, *you seem briefly to agree to his* day *or* condition. *For it is not necessary, that in the answer every word should be repeated, which the stipulator expressed.*

De his, qui sunt, vel habent, in potestate.

§ VI. Item inutilis est stipulatio, si vel ab eo stipuleris, qui tuo juri subjectus est, vel si is à te stipuletur. Sed servus quidem non

§ 6. *A stipulation is also void, if made with one who is under your power, or if he stipulate with you. For a slave is incapable not only of*

solùm domino suo obligari non potest, sed nè quidem ulli alii; filii verò familiarum aliis obligari possunt.

entering into an obligation with his master, but of binding himself to any other person. But the son of a family can enter into an obligation with any person, (but his father.)

De muto et surdo.

§ VII. Mutum neque stipulari neque promittere posse, palàm est; quod et in surdo receptum est: quia et is, qui stipulatur, verba promittentis, et is, qui promittit, verba stipulantis, audire debet. Unde apparet, non de eo nos loqui, qui tardius exaudit, sed de eo, qui omninò non audit.

§ 7. *It is evident, that a dumb man can neither stipulate, nor promise: and so of deaf persons; for he, who stipulates, ought to hear the words of the obligor; and he, who promises, the words of the stipulator. But we speak not of him, who hears with difficulty, but of him, who has no hearing.*

De furioso.

§ VIII. Furiosus nullum negotium gerere potest, quia non intelligit, quod agit.

§ 8. *A madman can transact no business, because he understands not what he does.*

De impubere.

§ IX. Pupillus omne negotium rectè gerit; ita tamen ut, ubi tutoris auctoritas necessaria sit, adhibeatur tutor; veluti, si ipse obligetur; nam alium sibi obligare etiam sinè tutoris auctoritate potest. Sed, quod diximus de pupillis, utique de iis verum est, qui jam habent aliquem intellectum. Nam infans, et qui infantiæ proximus est, non multùm à furioso distant; quia hujusmodi ætatis pupilli, nullum habent intellectum. Sed in proximis infantiæ, propter utilitatem eorum, benignior juris interpretatio facta est, ut idem juris habeant, quod pubertati proximi. Sed, qui in po-

§ 9. *A pupil may transact any business, if his tutor consent, where his authority is necessary; as it is, when the pupil would bind himself: but a pupil can stipulate or cause others to be bound to him, without the authority of his tutor. This must be understood of pupils who have some understanding; for an infant, or one next to an infant, differs but little from a person out of his senses: for pupils of such an age have no understanding: but the law is construed more favourably to those, who are but little removed from infancy, whenever their interest is concerned; for they are then allowed the*

testate parentis est impubes, ne auctore quidem patre obligatur.

same rights, as infants near the age of puberty. But a son, under power of his father, and within the age of puberty, cannot bind himself, even although his father consent.

De conditione impossibili.

§ X. Si impossibilis conditio stipulationibus adjiciatur, nihil valet stipulatio. Impossibilis autem conditio habetur, cui natura impedimento est, quominùs existat; veluti si quis ita dixerit, *si digito cœlum attigero, dare spondes?* at, si ita stipuletur, *si digito cœlum non attigero dare spondes?* pure facta obligatio intelligitur, ideòque statim peti potest.

§ 10. *If an impossible condition be added to an obligation, the stipulation is null; and that condition is reckoned impossible, of which nature forbids the event: as, if a man should say,* do you promise, if I touch the heavens with my finger? *but suppose a stipulation to be thus made;* do you promise, if I do not touch the sky with my finger? *such a stipulation would be understood to cause a simple obligation, the performance of which might be instantly demanded.*

De absentiâ.

§ XI. Item verborum obligatio, inter absentes concepta, inutilis est. Sed, cum hoc materiam litium contentiosis hominibus præstabat, fortè post tempus tales allegationes opponentibus, et non præsentes fuisse vel se vel adversarios suos contendentibus, ideò nostra constitutio propter celeritatem dirimendarum litium introducta est, quam ad Cæsarienses advocatos scripsimus; per quam disposuimus, tales scripturas, quæ præsto esse partes indicant, omninò esse credendas, nisi is, qui talibus utitur improbis allegationibus, manifestissimus probationibus, vel per scripturam, vel per testes idoneos, approbaverit, toto eo

§ 11. *A verbal obligation, made between absent persons, is also void. But, when this doctrine afforded matter of strife to contentious men, alledging after some time elapsed, that either they or the other parties were not present, we issued our constitution, addressed as a rescript to the advocates of* Cæsarea, *which effectually provided for the speedy determination of such suits: and by this we have ordained, that full credit shall be given to those written acts, or instruments, which declare, that the contracting parties were present; unless the party, who alledges absence, makes it evident by the most manifest proofs either in*

die, quo conficiebatur instrumentum, sese vel adversarium suum in aliis locis fuisse.

writing or by witnesses, that either he, or his adversary, was in some other place, during the whole day, in which the instrument was made.

De stipulatione post mortem, vel pridie quam alter contrahentium moriatur.

§ XII. Post mortem suam dari sibi nemo stipulari poterat, non magis quam post mortem ejus, à quo stipulabatur. Ac nec is, qui in alicujus potestate est, post mortem ejus stipulari poterat; quia patris vel domini voce loqui videretur. Sed et, si quis ita stipuletur, *pridie quam moriar*, vel, *pridie quam morieris, dare spondes?* inutilis erat stipulatio. Sed, cum, ut jam dictum est, ex consensu contrahentium stipulationes valeant, placuit nobis, etiam in hunc juris articulum necessariam inducere emendationem, ut, sivè post mortem, sive pridiè quam moriatur stipulator, sivè promissor, stipulatio concepta sit, stipulatio valeat.

§ 12. *A man could formerly no more stipulate, that a thing should be given him after his own death, than after the death of the obligor. Neither could any person under the power of another stipulate, that any thing should be given him after his death, because such person would appear to speak the words of his father or master. And, if a man had stipulated in this manner.* do you promise to give the day before I die? *or* the day before you die? *the stipulation was also invalid. But since all stipulations, as we have already said, take their force from the consent of the contracting parties, we have thought it proper to introduce a necessary emendation in this respect, so that, whether it be stipulated, that a thing shall be given after, or immediately before, the death either of the stipulator or the obligor, the stipulation shall be good.*

De stipulatione præpostera.

§ XIII. Item, si quis ita stipulatus erat, *si navis cras ex Asia venerit, hodie dare spondes?* inutilis erat stipulatio, quia præposterè concepta est. Sed, cum Leo inclytæ recordationis in dotibus eandem stipulationem, quæ præpostera nun-

§ 13. *Also, if a man had thus stipulated,* do you promise me money to-day, if a certain ship should arrive to-morrow from Asia? *it would have been invalid, because preposterously conceived. But, since the emperor* Leo, *of renowned me-*

cupatur, non esse rejiciendam existimaverit, nobis placuit et huic perfectum robur accommodare, ut non solùm in dotibus, sed etiam in omnibus, valeat hujusmodi conceptio stipulationis.

mory, was of opinion, that such stipulations ought not to be rejected as to marriage portions, it hath pleased us *also to give a fuller force to this doctrine by ordaining, that every stipulation of like import shall hold good not only in marriage portions, but likewise in all other contracts.*

De stipulatione collatâ in tempus mortis.

§ XIV. Ita autem stipulatio conceptа, veluti si Titius dicat, *cum moriar, dare spondes?* vel *cum morieris?* et apud veteres utilis erat, et nunc valet.

§ 14. *If a stipulation had been thus conceived;* do you promise, when I am about to die? *or* when you are about to die? *it was good by the ancient law, and is so now.*

§ XV. Item post mortem alterius rectè stipulamur.

§ 15. *We may also legally stipulate, (that a thing shall be given,) after the death of a third person.*

De promissione scriptâ in instrumento.

§ XVI. Si scriptum in instrumento fuerit, promisisse aliquem, perindè habetur, atque si interrogatione præcedente responsum sit.

§ 16. *If it be written in an act or instrument, properly attested, that a man hath entered into an obligation by promise, it will be presumed, that the promise was in answer to a precedent interrogation.*

De pluribus rebus in stipulationem deductis.

§ XVII. Quoties plures res unâ stipulatione comprehenduntur, siquidem promissor simplicitèr respondeat *dare spondeo*, propter omnes tenetur. Si verò unam ex his, vel quasdam, daturum se spoponderit, obligatio in iis, pro quibus spoponderit, contrahitur: ex pluribus enim stipulationibus una vel

§ 17. *When many things are comprehended in one stipulation, a man binds himself to all, if he answer simply* I promise. *But, if he promise to give one, or some of the things stipulated, an obligation is contracted only in respect to those. For, of many stipulations, it may happen, that only one, or some of them may*

quædam videntur esse perfectæ; singulas enim res stipulari, et ad singulas respondere, debemus.

be made perfect by a separate answer; and strictly we ought to stipulate for every thing severally, and to answer severally.

De pœnâ adjectâ stipulationi, *alii dari.*

§ XVIII. Alteri stipulari (ut suprà dictum est) nemo potest. Inventæ enim sunt hujusmodi stipulationes vel obligationes ad hoc, ut unusquisque acquirat sibi, quod sua interest; cæterùm, si alii detur, nihil interest stipulatoris. Planè, si quis velit hoc facere, pœnam stipulari conveniet, ut, nisi ita factum sit, ut est comprehensum, committatur pœnæ stipulatio etiam ei, cujus nihil interest. Pœnam enim cum stipulatur quis, non illud inspicitur, quod intersit ejus, sed quæ sit quantitas in conditione stipulationis. Ergò, si quis ita stipuletur, *Titio dari*, nihil agit; sed, si adjecerit pœnam, *nisi dederis, tot aureos dare spondes?* tunc committitur stipulatio.

§ 18. *No man can stipulate for another, as we have already observed; for stipulations and obligations have been invented, that every person may acquire for his own advantage; and, if this be given to another, the stipulator has no interest. But, if a man would effectually stipulate for another, he should bind the obligor to perform the covenants under a penalty, payable to him, who otherwise would receive no advantage from the obligation: for, when a penalty is stipulated, the interest of the stipulator is not so much regarded, as the quantum of penalty. Therefore, if a man should stipulate,* that a certain thing shall be given to TITIUS *it will not avail; but, if he add a penalty as,* do you promise to give me so many AUREI, if you do not give the thing stipulated to TITIUS? *the penalty stipulated is put in jeopardy.*

Si intersit ejus, qui alii stipulatur.

§ XIX. Sed et, si quis stipuletur alii, cum ejus interesset, placuit stipulationem valere. Nam, si is, qui pupilli tutelam administrare cœperat, cesserit administrationem contutori suo, et stipuletur rem pupilli salvam fore, quoniam interest stipulatoris fieri, quod stipulatus

§ 19. *But, if any man should stipulate for the benefit not merely of another, but of himself also, it is valid. Thus if he, who hath begun to administer the tutelage of a pupil, should afterwards give up the administration to his co-tutor, and stipulate for the security of the estate of*

est; cum obligatus futurus sit pupillo, si malè res gesserit, tenet obligatio. Ergo et, si quis procuratori suo dari stipulatus sit, habebit vires stipulatio. Et, si creditori suo quis stipulatus sit quod sua interest, ne fortè vel pœna committatur, vel prædia distrahantur, quæ pignori data erant, valet stipulatio.

his pupil, in this case, (inasmuch as such a stipulation is for the interest of the stipulator, who is liable for damages to the pupil, if the co-tutor should make default,) the obligation would bind. So if a man stipulate, that a thing shall be given to his proctor, it will bind. A stipulation made by a debtor for the use of his creditor is good, because it is the interest of the debtor, either that the penalty, upon which he borrowed, should not be exacted from him, or that his goods, which are pledged should not be sold.

De pœnâ adjectâ promissioni facti alieni.

§ XX. Vice versâ, qui alium facturum promisit, videtur in eâ esse causâ, ut non teneatur, nisi pœnam ipse promiserit.

§ 20. *On the contrary, he, who undertakes for the performance of another, is not bound unless he promises under a penalty.*

De re stipulantis futurâ.

§ XXI. Item nemo rem suam futuram, in eum casum, quo sua sit, utilitèr stipulatur.

§ 21. *No man can legally stipulate, that a thing shall be given him, when it shall become his own.*

De dissensu.

§ XXII. Si de aliâ re stipulator senserit, de aliâ promissor, perinde nulla contrahitur obligatio, ac si ad interrogatum, responsum non esset; veluti si hominem Stichum à te quis stipulatus fuerit, tu de Pamphilo senseris, quem Stichum vocari credideris.

§ 22. *If the stipulator allude to one thing, and the obligor to another, no more obligation is contracted, than if no answer had been made to the interrogation: and this would be the case, if a man should stipulate, that* Stichus *should be given to him, and the obligor should intend to give* Pamphilus, *upon a persuasion, that* Pamphilus *is called* Stichus.

De turpi causâ.

§ XXIII. Quod turpi ex causâ promissum est, veluti si quis homicidium vel sacrilegium se facturum promittat, non valet.

§ 23. *A promise made for a dishonest purpose, as, to commit homicide or sacrilege, is not binding.*

De morte contrahentium.

§ XXIV. Cum quis sub aliquâ conditione stipulatus fuerit, licet ante conditionem decesserit, postea existente conditione hæres ejus agere potest. Idem est et ex promissoris parte.

§ 24. *If the stipulator should die pending the event of a conditional stipulation, his heir may sue the obligor, if the event afterwards happen. And, should the obligor die before the condition happens, his heir may be sued by the* stipulator.

Quando agi potest ex stipulatione.

§ XXV. Qui hoc anno aut hoc mense dari stipulatus est, nisi omnibus partibus anni vel mensis præteritis, non rectè petet. Si fundum dari stipuleris, vel hominem, non poteris continuò agere, nisi tantum spatium præterierit, quo traditio fieri possit.

§ 25. *Whoever stipulates, that a thing shall be given to him this year or this month, cannot legally sue the obligor, until the whole year or month, is elapsed. And, if you stipulate, for a piece of ground, or a slave, you cannot instantly sue the obligor, but must wait, until a space of time hath past, in which a delivery might reasonably have been made.*

TITULUS VIGESIMUS-PRIMUS.

DE FIDEJUSSORIBUS.

D. xlvi. T. 1. C. viii. T. 41. Nov. 4.

Cur accipiuntur fidejussores.

PRO eo, qui promittit, solent alii obligari, qui fidejussores appellantur; quos homines accipere so-

Sometimes others bind themselves for the promissor. Such sureties are called fide-jussors, *and are gene-*

leat, dum curant, ut diligentius sibi cautum sit.

rally required by creditors for their greater security.

In quibus obligationibus.

§ I. In omnibus autem obligationibus assumi possunt; id est, sivè re sivè verbis, sivè literis, sivè consensu, contractæ fuerint: ac nec illud quidem interest, utrum civilis, an naturalis sit obligatio, cui adjicitur fidejussor; adeo quidem, ut pro servo quoque obligetur, sivè extraneus sit, qui fidejussorem à servo accipiat, sivè ipse dominus, in id, quod sibi naturalitèr debetur.

§ 1. Fide-jussors *may be received in all obligations, whether contracted by the delivery of the thing itself, by words, by writing, or the mere consent of parties: nor is it material, whether the obligation be civil or natural; for a man may intervene, and oblige himself, as a* fide-jussor *or surety, even on the behalf of a slave; and this may be done, whether the person, who accepts the* fide-jussor, *be a stranger or the master of the slave, when the thing due is a natural debt or obligation.*

De hærede.

§ II. Fidejussor non tantum ipse obligatur, sed etiam hæredem relinquit obligatum.

§ 2. *A* fide-jussor *is not only bound himself, but by his death transmits the obligation to his heir.*

Si fidejussor præcedat vel sequatur obligationem.

§ III. Fidejussor et præcedere obligationem et sequi potest.

§ 3. *A* fide-jussor *may be accepted, either before or after an obligation is entered into.*

De pluribus fidejussoribus.

§ IV. Si plures sint fidejussores, quotquot erunt numero, singuli in solidum tenentur; itaque liberum est creditori, à quo velit, solidum petere. Sed ex epistolâ Divi Hadriani compellitur creditor à singulis, qui modo solvendo sunt litis contestatæ tempore, partes petere; ideòque, si quis ex fidejussoribus eo tempore solvendo

§ 4. *Where there are* fide-jussors, *however numerous, each is bound for the whole debt; and the creditor may chuse, from whom he will demand it. But, by a rescript of the emperor* Adrian, *a creditor may be obliged to demand separately from every* fide-jussor, *who is solvent at the time of the suit, his share of the debt* pro ratâ; *and, if any of*

non sit, hoc cæteros onerat. Sed, si ab uno fidejussore creditor totum consecutus fuerit, hujus solius detrimentum erit, si is, pro quo fidejussit, solvendo non sit: et sibi imputare debet, cum potuerit juvari ex epistolâ Divi Hadriani, et desiderare, ut pro parte in se detur actio.

the fide-jussors, *at the time of the suit, is not solvent, the burden falls upon the rest. But, if a creditor obtain his whole demand from one of the* fide-jussors, *the whole loss shall be his, if the principal be insolvent: for such* fide-jussor *must blame himself, since under the rescript of the emperor* Adrian, *he might have prayed, that no action should be given against him, for more than his share of the debt, as surety.*

In quam summam obligatur fide-jussor.

§ V. Fidejussores ita obligari non possunt, ut plus debeant, quam debet is, pro quo obligantur: nam eorum obligatio accessio est principalis obligationis; nec plus in accessione potest esse, quam in principali re; at ex diverso, ut minus debeant, obligari possunt. Itaque, si reus decem aureos promiserit, fidejussor in quinque rectè obligatur; contra verò obligari non potest. Item, si ille purè promiserit, fidejussor sub conditione promittere potest; contra verò non potest. Non solùm autem in quantitate, sed etiam in tempore, minus aut plus intelligitur: plus enim est statim aliquid dare, minus est post tempus dare.

§ 5. Fide-jussors *ought not to be bound in a greater sum, than the debtor owes; for their obligation is an accession to the principal obligation; and an accessary debt cannot be greater than the principal, though it may be less. Therefore, if the principal obligor promises ten* aurei, *the* fide-jussor *may be bound in five; but the* fide-jussor *cannot be bound in ten, when the principal obligor is bound only in five. Also, when the obligor promises simply, the surety may promise conditionally; but, if the surety is bound simply, when the principal is bound conditionally, the obligation is void. And the terms* greater *and* less *take place, not only in quantity but also in time; for an obligation to deliver a thing instantly is greater, than to deliver it after a time.*

De actione fidejussoris.

§ VI. Si quid autem fidejussor pro reo solverit, ejus recuperandi causâ habet cum eo mandati judicium.

§ 6. *If a* fide-jussor *hath been obliged to pay money for his principal, he may have an action of mandate to recover the sum paid.*

Si fidejussor græcè accipiatur.

§ VII. Græce etiam fidejussor ita accipitur, τῇ ἐμῇ πίστει κέλευσα, λέγω. Sed et si dixerit, θέλω, sivè βούλομαι, sed et, φημι, pro eo erit, ac si dixerit, λέγω.

§ 7. *A* fide-jussor *may thus bind himself even in greek;* I answer or speak solemnly upon my faith. *But, the expressions, I am willing, or I promise, would answer the same purpose.*

Si scriptum sit, aliquem fidejussisse.

§ VIII. In stipulationibus fidejussorum sciendum est, hoc generalitèr accipi, ut, quodcunque scriptum sit quasi actum, videatur etiam actum. Ideòque constat, si quis scripserit se fidejussisse, videri omnia solemnitèr acta.

§ 8. *It is a general rule in all fide-jussorial stipulations, that whatever is alledged in writing to have been done, is presumed to have been actually done: therefore, if a man in writing confesses, that he hath become a* fide-jussor, *it is also presumed, that the necessary forms were observed.*

TITULUS VIGESIMUS-SECUNDUS.

DE LITERARUM OBLIGATIONIBUS.

C. iv. T. 30.

OLIM scripturâ fiebat obligatio, quæ nominibus fieri dicebatur; quæ nomina hodie non sunt in usu. Planè, si quis debere se scripserit, quod sibi numeratum non est, de pecuniâ minimè numeratâ, post multum temporis, exceptionem op-

A species of written obligation anciently prevailed, by registering the names of the contractors; these were called nomina, *but are not now in use. But, if a man confesses in writing, that he owes, what in reality he never received, he cannot plead*

ponere non potest: hoc enim sæpissimè constitutum est. Sic fit, ut et hodie, dum queri non potest, scripturâ obligetur; et ex eâ nascatur condictio, cessante scilicèt verborum obligatione. Multum autem tempus in hac exceptione antea quidem ex principalibus constitutionibus usque ad quinquennium procedebat: sed, ne creditores diutius possint suis pecuniis forsitan defraudari, per constitutionem nostram tempus coarctum est, ut, ultra biennii metas, hujusmodi exceptio minimè extendatur.

as an exception after a long period, that the money was never advanced: *and this limitation of time has frequently been prescribed by the constitutions. Hence, at this day, a man is bound by his written note, if he cannot legally bring an exception; and from this written contract arises an action called a* condiction, *when no verbal obligation can be proved. Formerly the imperial constitutions allowed a space of time, not less than five years, in which any man might bring an exception,* pecuniæ non numeratæ, *i. e. of money not advanced. But for the safety of creditors we have abridged this time, and ordained, that such an exception shall not lie after two years.*

TITULUS VIGESIMUS-TERTIUS.

DE OBLIGATIONIBUS EX CONSENSU.

Continuatio.

CONSENSU fiunt obligationes in emptionibus, venditionibus, locationibus, conductionibus, societatibus, mandatis: ideò autem istis modis obligatio dicitur consensu contrahi, quia neque scripturâ, neque præsentiâ, omnimodo opus est: ac nec dari quicquam necesse est, ut substantiam capiat obligatio; sed sufficit, eos, qui negotia gerunt, consentire: unde inter absentes quoque talia negotia contrahuntur,

Obligations or contracts are made by consent in buying, selling, letting, hiring, partnerships *and* mandates. *An obligation, that is entered into is said to be contracted by consent; because neither writing nor the presence of parties is absolutely requisite. Nor is delivery necessary to make the contract take effect; for it suffices, that the parties consent; hence these contracts may be entered into by absent parties, by letters,*

relati per epistolam vel per nuntium. Item in his contractibus alter alteri obligatur in id, quod alterum alteri ex bono et æquo præstare oportet; cum alioqui in verborum obligationibus alius stipuletur, alius promittat.

or messengers; and they are bound to each other mutually to do what is just and right; but generally in verbal contracts one party stipulates and the other promises.

TITULUS VIGESIMUS-QUARTUS.

DE EMPTIONE ET VENDITIONE.

D. xviii. & xix. T. 1. C. iv. T. 38. & 40.

De emptione purâ. De pretii conventione, arrhis, et scripturâ.

EMPTIO et venditio contrahitur, simul atque de pretio convenerit, quamvis nondum pretium numeratum sit, ac ne arrha quidem data fuerit; nam, quod arrhæ nomine datur, argumentum est emptionis et venditionis contractæ. Sed hoc quidem de emptionibus et venditionibus, quæ sinè scripturâ consistunt, obtinere oportet; nam nihil à nobis in hujusmodi emptionibus et venditionibus innovatum est. In iis autem, quæ scripturâ conficiuntur, non aliter perfectam esse venditionem et emptionem constituimus, nisi et instrumenta emptionis fuerint conscripta, vel manu propriâ contrahentium, vel ab alio quidem scripta, à contrahentibus autem subscripta; et si per tabellionem fiunt, nisi et completiones acceperint, et fuerint partibus abso-

The contract of buying and selling is perfected as soon as the price is agreed upon, although it be not paid, nor even an earnest given; for earnest, does not constitute a contract, but serves only as proof of it. And this is the law respecting bargains and sales, not in writing; for herein we have made no innovation. But, where there is a written contract, we have ordained, that a bargain and sale shall not become absolute, unless the instruments of sale are written by the contracting parties, or at least signed by them, if written by others; and if drawn by a public notary, unless executed and delivered complete in all their parts: for, if any thing be omitted, there is locus pœnitentiæ—*room to retract; and either the buyer or seller may recede without penalty, if no earnest*

luta. Donec enim aliquid deest ex his, et pœnitentiæ locus est, et potest emptor vel venditor sinè pœnâ recedere ab emptioncet venditione. Ita tamen impunè recedere concedimus, nisi jam arrharum nomine aliquid fuerit datum; hoc enim subsecuto, sivè in scriptis, sivè sinè scriptis, venditio celebrata est, is, qui recusat adimplere contractum, si quidem est emptor, perdit quod dedit; si verò venditor, duplum restituere compellitur; licet super arrhis nihil expressum sit. Pretium autem constitui oportet; nam nulla emptio sinè pretio esse potest.

has been given. But, if it has, then the buyer, whether the contract was written or unwritten, if he refuse to fulfil it, loses his earnest, and the seller, if he refuse, is compellable to restore double the value of the earnest, although no agreement of this kind was expressly made. But the price should be fixed; for, until then, there can be no purchase.

De pretio certo, vel incerto, vel in arbitrium alienum collato.

§ I. Sed et certum esse pretium debet: alioqui, si inter aliquos ita convenerit, ut, quanti Titius rem æstimaverit, tanti sit empta, inter veteres satis abundèque hoc dubitabatur, constaretne venditio, an non. Sed nostra decisio ita hoc constituit, ut, quoties sic composita sit venditio, *quanti ille æstimaverit*, sub hac conditione staret contractus, ut siquidem ille, qui nominatus est, pretium definierit, tunc omnimodo secundum ejus æstimationem et pretium persolvatur, et res tradatur, et venditio ad effectum perducatur; emptore quidem ex empto actione, venditore ex vendito agente. Sin autem ille, qui nominatus est, vel noluerit, vel non potuerit, pretium definire, tunc pro nihilo esse venditionem, quasi nullo pretio statuto. Quod jus, cum

§ 1. *The price, ought to be certain. And formerly, when it was covenanted, that a thing should be sold*, at whatever price TITIUS should value it, *the ancient lawyers much doubted, whether such a sale was good. But we have ordained, that when the sale is so made as that the* price shall be fixed by a third person, *it shall be valid under that condition; so that, if the nominee, or arbitrator, determine the price, it ought to be paid accordingly, the thing sold, delivered, and the sale perfected; otherwise the buyer may have an action* ex empto, *for the thing bought; and the seller an action* ex vendito, *for the thing sold. But, if the arbitrator either refuse, or is unable to determine the price, the sale is null. And, as we have so enacted in relation to sales, it is not*

in venditionibus nobis placuerit, non est absurdum et in locationibus et in conductionibus trahere.

improper that the same law should prevail, in letting and hireing.

In quibus pretium consistat. Differentia emptionis et permutationis.

§ II. Item pretium in numeratâ pecuniâ consistere debet; nam in cæteris rebus, an pretium esse posset, valdè quærebatur; veluti, an homo, aut fundus, aut toga, alterius rei pretium esse possit. Et Sabinus et Cassius etiam in aliâ re putabant pretium posse consistere; undè illud, quod vulgò dicebatur, permutatione rerum emptionem et venditionem contrahi; eamque speciem emptionis et venditionis vetustissimam esse. Argumentoque utebantur Græco poetâ Homero, qui aliquam partem exercitûs Achivorum vinum sibi comparasse ait, permutatis quibusdam rebus, his verbis.

Νηες δ' εκ Λημνοιο παρεσσαται οινον αγουσαι
Ενθεν ας ωνιζοντο καρηκομοωντες Αχαιοι,
Αλλοι μεν χαλκω, αλλοι δ' αιθωνι σιδηρω
Αλλοι δε ρινοις, αλλοι δ' αυτοισι βοεσσιν,
Αλλοι δ' ανδραποδισι.

Hoc est.

Naves autem e Lemno appulerunt vinum vehentes:
Illinc vinum emebant *Achivi comantes caput,*
Alii quidem ære, alii autem ferro nigro,
Alii pellibus, alii ipsis bobus,
Alii etiam mancipiis.

Iliad VII.

§ 2. *The price of an article bought, should be cash, or money told; for it hath been much doubted, whether the price of goods can be said to be paid, if any thing be given for them but money; as, whether a slave, a piece of ground, or a robe, can be paid as the price of a thing. The lawyers* Sabinus *and* Cassius *thought, that a price might consist of any thing, and from hence it has been commonly said, that* emptio-venditio, *or buying and selling, is contracted by (barter) commutation; and that this species of buying and selling is the most ancient. The advocates for this side of the question quote* Homer, *who relates in the following lines, that a part of the Grecian army* bought *wine by giving other things in exchange for it.*

Wine the rest *purchas'd* at their proper cost,
And well the plenteous freight supplied the host:
Each in exchange proportion'd treasures gave,
Some brass or iron, some an ox or slave. *Pope.*

But the lawyers of a different sect maintained that commutation was one thing, and emptio-venditio *another; for otherwise said they, in the*

Diversæ scholæ auctores contra sentiebant; aliudque esse existimabant permutationem rerum, aliud emptionem et venditionem; alioqui non posse rem expediri, permutatis rebus, quæ videatur res vænisse, et quæ pretii nomine data esse; nam, utramque videri et vænisse et pretii nomine datam esse, rationem non pati. Sed Proculi sententia, dicentis, permutationem propriam esse speciem contractûs à venditione separatam, meritò prævaluit; cum et aliis Homericis versibus adjuvabatur, et validioribus rationibus argumentabatur: quod et anteriores Divi Principes admiserunt, et in nostris Digestis latius significatur.

commutation of any two things it can never appear, which has been sold, and which has been given, as the price of the thing sold; and it is contrary to reason, that each should appear to have been sold, and that each also should appear to have been given, as the price of the other. The opinion of Proculus, *who maintained, that commutation is a species of contract, separate from vendition, hath deservedly prevailed: for he is supported by other verses from* Homer, *and has enforced his opinion with strong arguments; and this is the doctrine, which our predecessors, the emperors* Dioclesian *and* Maximian, *have admitted, as appears more at large in our Digests.*

De periculo et commodo rei venditæ.

§ III. Cum autem emptio et venditio contracta sit, (quod effici diximus simul atque de pretio convenerit, cum sinè scripturâ res agitur,) periculum rei venditæ statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit. Itaque, si homo mortuus sit, vel aliquâ parte corporis læsus fuerit, aut ædes totæ, vel aliquâ ex parte, incendio consumptæ fuerint, aut fundus vi fluminis totus vel aliquâ ex parte ablatus sit, sivè etiam inundatione aquæ, aut arboribus turbine dejectis, longè minor aut deterior esse cœperit, emptoris damnum est; cui necesse est, licèt rem non fuerit nactus, pretium solvere. Quicquid enim sinè dolo et culpâ venditoris accidit, in eo ven-

§ 3. *When emption and vendition are once contracted, (which is so soon as the price is agreed on, when the covenant is not in writing,) the buyer becomes liable to the risque of the thing sold, although it be not yet delivered. Therefore, if a slave should die, or be hurt, or if a building, or part of it should be consumed by fire, or if lands sold, or any part of them, should be washed away by a torrent, or damaged by an inundation, or by a storm, which may destroy the trees, the loss must be sustained by the buyer, who must pay the price agreed on, although he never had possession of the thing; for whatever the accident be, if it happen neither by the fraud, nor fault of the seller, he is secure. On the other*

ditor securus est: sed et, si post emptionem fundo aliquid per alluvionem accesserit, ad emptoris commodum pertinet; nam et commodum ejus esse debet, cujus periculum est. Quod si fugerit homo, qui væniit, aut surreptus fuerit, ita ut neque dolus, neque culpa venditoris intervenerit, animadvertendum erit, an custodiam ejus usque ad traditionem venditor susceperit; sanè enim si susceperit, ad ipsius periculum is casus pertinet; si non susceperit, securus est. Idem et in cæteris animalibus cæterisque rebus intelligimus. Utique tamen vindicationem rei et condictionem exhibere debebit emptori; quia sanè, qui nondum rem emptori tradidit, adhuc ipse dominus est. Idem etiam est de furti et de damni injuriæ actione.

hand, if, after sale, the lands should be increased by alluvion, this increase becomes the gain of the buyer; for it is just, that he should receive the profit, who must have sustained the loss. But, if a slave who is sold, should run away or be stolen, and no fraud or negligence can be imputed to the seller, it must be inquired, whether the seller undertook the safe custody of the slave, until delivery should be made; if he did, he is answerable, if not, he is secure. The same law takes place in regard to all other animals and things. But, the seller should make over his right of vindication and condiction to the buyer; for he, who has not delivered the thing sold, is still considered as the proprietor of it. Actions also of theft, or damage done, must be transferred by the seller to the buyer, (when the thing sold is stolen, or damaged before delivery.)

De emptione conditionali.

§ IV. Emptio tam sub conditione quam purè contrahi potest: sub conditione, veluti, *si Stichus intra certum diem tibi placuerit, erit tibi emptus aureis tot.*

§ 4. *A sale may be contracted conditionally, as well as purely: as when the seller agrees;* if within a certain time you shall approve of the slave STICHUS, he shall be your's for so many AUREI.

De emptione rei, quæ non est in commercio.

§ V. Loca sacra, vel religiosa, item publica, (veluti forum, basilicam,) frustra quis sciens emit; quæ tamen, si pro profanis vel privatis deceptus à venditore quis emerit, habebit actionem ex empto, quod non habere ei liceat, ut consequatur,

§ 5. *Whoever knowingly purchases a sacred, religious, or public place, such as a Forum, or Court of justice, it is void. But, if he purchased them as profane or private, being imposed upon by the seller, then such purchaser, not being able*

quod sua interest, eum deceptum non esse. Idem juris est, si hominem liberum pro servo emerit.

to obtain possession, may have an action ex empto *against the seller, and recover damage for the deceit. The law is the same, if any person should mistakenly buy a freeman instead of a slave.*

TITULUS VIGESIMUS-QUINTUS.

DE LOCATIONE ET CONDUCTIONE.

D. xix. T. 2. C. iv. T. 65. C. ii. T. 70.

Collato emptionis, et locationis. De mercedis conventione.

LOCATIO et conductio proxima est emptioni et venditioni, iisdemque juris regulis consistit. Nam ut emptio et venditio ita contrahitur, si de pretio convenerit, sic et locatio et conductio ita contrahi intelligitur, si merces constituta sit: et competit locatori quidem *locati* actio, conductori verò *conducti*.

Location *and* conduction, *i. e. letting and hireing, are nearly allied to* emption *and* vendition, *i. e. buying and selling; and are governed by the same rules; for as the latter takes place so soon as the price is agreed upon, so the former are contracted, when the hire is once fixed by the parties. The* locator, *or person who lets, is intitled if aggrieved, to an* actio locati, *and the* conductor *or* hirer *may have his* actio conducti, *against the* locator.

De mercede collatâ in arbitrium alienum.

§ I. Et, quæ supra diximus, si alieno arbitrio pretium permissum fuerit, eadem et de locatione et de conductione dicta esse intelligimus si alieno arbitrio merces permissa fuerit. Quâ de causâ, si fulloni poliendo curandave, aut sarcinatori sarcienda, vestimenta quis dederit, nullâ statim mercede constitutâ, sed

§ 1. *What has been said before respecting sales, when the price is referred to a third person, may also be understood of* location *and* conduction, *when the hire is left to arbitration. Therefore, if a man send his cloaths to a fuller to be scoured, or a taylor to be mended, and do not previously agree upon*

postea tantum daturus, quantum inter eos convenerit, non propriè locatio et conductio contrahi intelligitur; sed eo nomine actio *præscriptis verbis* datur.

any price, in this case location *and* conduction *are not understood to be properly contracted; but an action on the case may be brought by either party*, præscriptis verbis, *i. e. in words adapted to the circumstances.*

In quibus rebus merces consistat.

§ II. Præterea, sicùt vulgo quærebatur, an permutatis rebus emptio et venditio contraheretur, ita quæri solebat de locatione et conductione, si fortè rem aliquam utendam sivè fruendam tibi aliquis dederit, et invicèm à te utendam sivè fruendam aliam rem acceperit. Et placuit, non esse locationem et conductionem, sed proprium genus contractûs; veluti, si, cum unum bovem quis haberet, et vicinus ejus item unum, placuerit inter eos, ut per denos dies invicèm boves commodarent, ut opus facerent, et apud alterum alterius bos perierit; neque locati, neque conducti, neque commodati competit actio: quia non fuit commodatum gratuitum: verùm præscriptis verbis agendum est.

§ 2. *As it was formerly a question, whether* emption *and* vendition *could be contracted by exchange, so it hath also been doubted, whether* location *and* conduction *takes place when one man lends another a particular thing for his use; and receives in return some other thing, of which he is also permitted to have the use; and it has been determined, that this exchange does not constitute* location *and* conduction, *but a distinct species of contract: for example, if two neighbours have each of them an ox, and each agrees to lend his ox to the other alternately for ten days to labour, and the ox of the one should die in possession of the other, in this case, he, who has lost his ox, can neither bring the action* locati, *nor* conducti, *nor even the action* commodati; *for the ox was not lent gratuitously: but he may sue* præscriptis verbis; *i. e. by an action upon the case.*

De Emphyteusi.

§ III. Adeò autem aliquam familiaritatem inter se videntur habere emptio et venditio, item locatio et conductio, ut in quibusdam causis quæri soleat, utrum emptio

§ 3. *Buying and selling, and letting and hireing, are so nearly connected, that, in some cases, it has been difficult to distinguish the one from the other; as when lands have*

et venditio contrahatur, an locatio et conductio; ut ecce de prædiis, quæ perpetuò quibusdam fruenda traduntur, id est, ut, quamdiu pensio sivè reditus pro his domino præstetur, neque ipsi conductori, neque hæredi ejus, cuive conductor hæresve ejus id prædium vendiderit, aut donaverit, aut dotis nomine dederit, aliove quocunque modo alienaverit, auferre liceat. Sed talis contractus quia inter veteres dubitabatur, et à quibusdam locatio, à quibusdam venditio existimabatur, lex Zenoniana lata est, quæ emphyteuseos contractûs propriam statuit naturam, neque ad locationem, neque ad venditionem inclinantem, sed suis pactionibus fulciendam; et, si quidem aliquid pactum fuerit, hoc ita obtinere, ac si naturalis esset contractus: sin autem nihil de periculo rei fuerit pactum, tunc, siquidem totius rei interitus accesserit, ad dominum super hoc redundare periculum; sin autem particularis, ad emphyteuticarium hujusmodi damnum venire; quo jure utimur.

been demised for ever, upon condition, that, if a certain yearly rent, be paid to the proprietor, it shall not be in his power to take these lands from the tenant or his heirs, or from any other person, to whom such tenant or his heirs shall have sold or granted or given them as a marriage portion, or otherwise. But when this contract, concerning which the ancient lawyers had great doubts, was by some regarded as an emption and vendition, and by others as a location and conduction, the Zenonian *law was enacted, which settled the proper nature of an* emphyteusis, *making it to be neither the one nor the other, but a contract supported by its own peculiar covenants; and ordaining, that whatever is agreed upon by the parties shall take place, as a contract: and when there is no covenant, which declares, upon whom the loss of the lands shall fall, that then, if the whole estate happen to be destroyed by a torrent, an earthquake, or any other means, the proprietor must be the sufferer; but, if a part only be destroyed, that the loss shall then be borne by the tenant; and this is the law in use.*

De formâ alicui faciendâ ab aurifice.

§ IV. Item quæritur, si cum aurifice Titius convenerit, ut is ex auro suo certi ponderis certæque formæ annulos ei faceret, et acciperet, (verbi gratiâ,) decem aureos, utrum emptio et venditio, an locatio et conductio contrahi videatur? Cassius ait, materiæ quidem emp-

§ 4. *Also, if* Titius, *should promise a goldsmith* ten aurei *to make a certain number of rings, of a particular size and weight, and find the gold; it hath been a question, whether such a contract would be a buying and selling, or a letting and hireing.* Cassius *was of opinion, that it would*

tionem et venditionem contrahi, operæ autem locationem et conductionem: sed placuit, tantum emptionem et venditionem contrahi. Quod si suum aurum Titius dederit, mercede pro operâ constitutâ, dubium non est, quin locatio et conductio sit.

be a buying and selling in regard to the matter, and a letting and hireing in regard to the work; but it is now settled, that, it would only amount to emption and vendition. But, if Titius *should give his own gold, and agree to pay only for the workmanship, this would certainly be a location and conduction.*

Quid præstare debet conductor.

§ V. Conductor omnia secundùm legem conductionis facere debet; et, si quid in lege prætermissum fuerat, id ex bono et æquo præstare. Qui pro usu aut vestimentorum, aut argenti, aut jumenti, mercedem aut dedit aut promisit, ab eo custodia talis desideratur, qualem diligentissimus pater familias suis rebus adhibet; quam si præstiterit, et aliquo casu fortuito eam rem amiserit, de restituenda ea re non tenebitur.

§ 5. *The hirer is not only obliged to observe strictly the covenants of the conduction, but is also bound to perform whatever hath been omitted to be inserted, but ought reasonably to be done. And whoever hath given or promised hire for the use of cloaths, silver, horses, &c. is bound to take the same care of them, as the most diligent master of a family would take of his own property. But, if the hirer do this, and yet lose the things hired by some fortuitous event, he shall not be answerable for the loss.*

De morte conductoris.

§ VI. Mortuo conductore intra tempora conductionis, hæres ejus eodem jure in conductione succedit.

§ 6. *If the hirer die before the time of hireing be expired, his heir succeeds to his right, and is intitled to the thing hired, for the remainder of the term.*

TITULUS VIGESIMUS-SEXTUS.

DE SOCIETATE.

D. xvii. T. 2. C. iv. T. 37.

Divisio à materiâ.

SOCIETATEM coire solemus aut totorum bonorum, quam Græci specialiter κοινωνίαν appellant; aut unius alicujus negotiationis, veluti mancipiorum vendendorum emendorumque, aut olei, aut vini, aut frumenti emendi vendendique.

It is common for persons to enter either into a general partnership, or what the Greeks call a communion of goods; or into a particular partnership, respecting some single species of commerce, as that of buying and selling slaves, oil, wine, or corn.

De partibus lucri et damni.

§ I. Et quidem, si nihil de partibus lucri et damni nominatim convenerit, æquales scilicet partes et in lucro et in damno spectantur; quod si expressæ fuerint partes, hæ servari debent. Nec enim unquam dubium fuit, quin valeat conventio, si duo inter se pacti sint, ut ad unum quidem duæ partes et lucri et damni pertineant, ad alterum tertia.

§ 1. *If no express agreement be made by the partners concerning their shares of profit and loss; the loss and the profit must be equally divided. But, if an express agreement be made, it must be observed; for it was never yet doubted, but that the covenant would be binding, if two persons should agree, that two shares of the profit and loss should belong to one partner, and that only the third part of both should belong to the other.*

De partibus inæqualibus.

§ II. De illâ sanè conventione quæsitum est, si Titius et Seius inter se pacti sint, ut ad Titium lucri duæ partes pertineant, damni tertia, ad Seium duæ partes damni, lucri tertia, an rata debeat haberi conventio? Quintus Mutius contra naturam societatis talem pactionem esse existimavit, et ob id non esse

§ 2. *But it has been questioned, if* Titius *and* Seius *should covenant, that* Titius *should receive two parts of the profit and bear but a third of the loss, and that* Seius *should bear two parts of the loss, and receive but a third of the profit, whether such an agreement would be binding?* Quintus Mutius *deemed such*

ratam habendam: Servius Sulpitius (cujus sententia prævaluit) contra sensit; quia sæpè quorundam ita pretiosa est opera in societate, ut eos justum sit conditione meliore in societatem admitti. Nam et ita posse coiri societatem non dubitatur, ut alter pecuniam conferat, alter non conferat, et tamen lucrum inter eos commune sit; quia sæpè opera alicujus pro pecunia valet. Et adeò contra Quinti Mutii sententiam obtinuit, ut illud quoque constiterit posse convenire, ut quis lucri partem ferat, de damno non teneatur; quod et ipsum Servius convenientèr sibi fieri existimavit. Quod tamen ita intelligi oportet, ut, si in aliâ re lucrum, in aliâ damnum illatum sit, compensatione factâ, solùm quod superest, intelligatur lucro esse.

a covenant contrary to the nature of partnership, and therefore ought not to be ratified; but Servius Sulpitius, *whose opinion hath prevailed, thought otherwise; because the labour of some is so valuable, that they ought to be admitted into partnership upon advantageous conditions; for no man doubts, but that a partnership may be, wherein one only finds money; inasmuch as it often happens, that the work, and labour of the other, is of equal value. And also, contrary to the opinion of* Mutius, *it hath obtained as law, that a partner may by agreement take a share of the profit, and not be accountable for any part of the loss; for* Servius *thought, that, this likewise might be done equitably: but it must be so understood, that, if profit accrue from one species of things, and loss from another, only what remains, after the loss is compensated, shall be considered as profit.*

De partibus expressis in unâ causâ.

§ III. Illud expeditum est, si in unâ causâ pars fuerit expressa, (veluti in solo lucro, vel in solo damno,) in alterâ vero omissa, in eo quoque, quod prætermissum est, eandem partem servari.

§ 3. *It is also a settled point, that, if partners expressly mention their shares in one respect only, either solely as to gain, or solely as to loss, their shares of that which is omitted, shall be regulated by what is expressed.*

Quibus modis societas solvitur. De renunciatione.

§ IV. Manet autem societas eo usque, donec in eodem consensu perseveraverint: at, cum aliquis renunciaverit societati, solvitur societas. Sed planè si quis callidè in

§ 4. *A partnership lasts so long as the partners persevere in their consent so to continue; and, if one of them renounce, the partnership is dissolved. But, if a man renounce*

hoc renunciaverit societati, ut obveniens aliquod lucrum solus habeat, veluti, si totorum bonorum socius, cum ab aliquo hæres esset relictus, in hoc renunciaverit societati, ut hæreditatem solus lucri faceret, cogitur hoc lucrum communicare. Si quid verò aliud lucri faciat, quod non captaverit, ad ipsum solum pertinet. Ei verò, cui renunciatum est, quicquid omninò post renunciatem societatem acquiritur, soli conceditur.

with a fraudulent intent, and that he may enjoy the sole benefit of some future fortune, which he expects, his renunciation will not avail: for, if a partner in common, on being appointed heir, should renounce his partnership, that he may possess the inheritance exclusively, he would nevertheless be compelled to divide equally with his former partners; yet, if an inheritance, which he did not expect, should by accident fall to him after renunciation, the whole would be his own: but those, from whom a partner hath separated himself by renouncing, possess solely for themselves whatever they acquire, after the renunciation of that partner.

De morte.

§ V. Solvitur adhuc societas etiam morte socii; quia, qui societatem contrahit, certam personam sibi eligit. Sed et, si consensu plurium societas contracta sit, morte unius socii solvitur, etsi plures supersint; nisi in coeundâ societate alitèr convenerit.

§ 5. *A partnership is also dissolved by the death of one of the partners; for he, who enters into partnership, always chuses some known person to be his partner. And if a partnership be entered into by the consent of many, it is dissolved by the death of one, although the rest survive; unless the original contract be otherwise.*

De fine negotii.

§ VI. Item, si alicujus rei contracta societas sit, et finis negotio impositus est, finitur societas.

§ 6. *Also, if a partnership be entered into on account of some particular commerce, when that ceases, the partnership is ended.*

De publicatione.

§ VII. Publicatione quoque distrahi societatem, manifestum est, scilicet si universa bona socii publi-

7. *Partnership is also dissolved by the public sale or confiscation of all the property of one of the part-*

centur; nam, cum in ejus locum alius succedat, pro mortuo habetur.

ners; for when another takes his place, he is considered as dead.

De cessione bonorum.

§ VIII. Item, si quis ex sociis mole debiti prægravatus bonis suis cesserit, et ideo propter publica et privata debita substantia ejus væneat, solvitur societas. Sed hoc casu, si adhuc consentiant in societatem, nova videtur incipere societas.

§ 8. *Also, when a man in partnership, being pressed by debts, makes a cession of his goods, and they are sold to satisfy either public or private demands, the partnership is dissolved. But, if the rest should still desire to remain partners, the first partnership would not continue, but a new one would commence.*

De dolo et culpâ à socio præstandis.

§ IX. Socius socio utrum eo nomine tantum teneatur pro socio actione, si quid dolo commiserit, sicut is, qui deponi apud se passus est, an etiam culpæ, id est, desidiæ atque negligentiæ nomine, quæsitum est? Prævaluit tamen, etiam culpæ nomine teneri eum. Culpa autem non ad exactissimam diligentiam dirigenda est; sufficit enim talem diligentiam communibus rebus adhibere socium, qualem suis rebus adhibere solet. Nam, qui parùm diligentem socium sibi assumit, de se queri, sibique hoc imputare, debet.

§ 9. *It has been a question, whether a partner, like a depositary, is accountable for fraud only, or also for negligence? And it now prevails, that he is answerable for all the damages, which happen through his fault. But though he fail in having used the most exact diligence, such a failure, is not regarded as* culpa, *or a fault: for a partner is not liable to answer damages, if it appear that he has used the same care and diligence in respect of the partnership property as he has usually observed in keeping his own. Whoever chuses a negligent man for his partner, must lay the blame upon himself only, and impute his misfortune to his own ill choice.*

TITULUS VIGESIMUS-SEPTIMUS.

DE MANDATO.

D. xvii. T. 1. C. iv. T. 35.

Divisio à fine.

MANDATUM contrahitur quinque modis, sivè suâ tantùm gratiâ aliquis tibi mandet, sivè suâ et tuâ, sivè alienâ tantùm, sivè suâ et alienâ, sivè tuâ et alienâ. At, si tuâ tantùm gratiâ tibi mandatum sit, supervacuum est mandatum; et ob id nulla ex eo obligatio, nec mandati inter vos actio nascitur.

A mandate is of five kinds; either when it is given solely for the benefit of the mandator; or jointly for his benefit, and that of the mandatary; or solely for the benefit of a third person; or jointly for the benefit of the mandator and a third person; or jointly for the benefit of the mandatary and a third person. But, if a mandate be given solely for the sake of the mandatary, the mandate is useless; for no obligation can arise from it, nor of course any action.

Si mandantis gratiâ mandetur.

§ I. Mandantis tantum gratiâ intervenit mandatum, veluti si quis tibi mandet, ut negotia ejus gereres, vel ut fundum ei emeres, vel ut pro eo sponderes.

§ 1. *A mandate is given solely for the benefit of the mandator, when he requires the mandatary to transact his business, to buy lands, or to become his surety.*

Si mandantis et mandatarii.

§ II. Tuâ gratiâ et mandantis; veluti si mandet tibi, ut pecuniam sub usuris crederes ei, qui in rem ipsius mutuaretur; aut si, volente te agere cum eo ex fidejussoriâ causâ, mandet tibi, ut cum reo agas periculo mandantis; vel ut ipsius

§ 2. *A mandate is given partly for the benefit of the mandator, and partly for your benefit (the mandatary,) if the mandator require you to lend money upon interest to one who would borrow it for his use; or if, when you are upon the point*

periculo stipuleris ab eo, quem tibi deleget in id, quod tibi debuerat.

of suing a man on account of a fidejussory caution, or suretyship, he should authorise you at his own risque to sue the principal debtor; or if he should impower you at his own hazard to stipulate for the sum, which he owes you, from some other person, whom he appoints.

Si alienâ gratiâ.

§ III. Alienâ tantum causâ intervenit mandatum; veluti si tibi aliquis mandet, ut Titii negotia gereres, vel ut Titio fundum emeres, vel ut pro Titio sponderes.

§ 3. *A mandate is for the sole interest of a third person, when the mandator requires the mandatary to perform some office, to buy lands, or to become bail for that person.*

Si mandantis et alienâ.

§ IV. Suâ et alienâ; veluti si de communibus suis et Titii negotiis gerendis tibi mandet, vel ut sibi et Titio fundum emeres, vel ut pro eo et Titio sponderes.

§ 4. *A mandate is for the joint benefit of the mandator, and a third person, when the mandator requires the mandatary to transact their common business, to buy lands for them both, or to be bound for them.*

Si mandatarii et alienâ.

§ V. Tuâ et alienâ; veluti si tibi mandet, ut Titio sub usuris crederes; quia, si sinè usuris pecuniam crederes, alienâ tantum gratiâ intercedit mandatum.

§ 5. *A mandate is in favour of the mandatary and a third person, when the mandator requires you to lend money to* Titius, *upon interest; but, if without interest, it can only be in favour of him, to whom it is lent.*

Si mandatarii.

§ VI. Tuâ tantùm gratiâ intervenit mandatum; veluti si tibi mandet, ut pecunias tuas in emptiones potius prædiorum colloces, quam fœneres; vel ex diverso, ut pecunias tuas fœneres potius, quam in emptiones prædiorum colloces. Cu-

§ 6. *A mandate is given solely for your own benefit, if the mandator require you rather to make a purchase of lands, than to lend upon interest; or, on the contrary, rather to lend your money upon interest, than to buy lands. But as this*

jus generis mandatum magis consilium, quam mandatum est, et ob id non est obligatorium; quia nemo ex consilio mandati obligatur, etiam si non expediat ei, cui mandabatur, cum liberum cuique sit apud se explorare, an sibi expediat consilium. Itaque, si otiosam pecuniam domi te habentem hortatus fuerit aliquis, ut rem aliquam emeres, vel eam crederes, quamvis non expediat eam tibi emisse, vel credidisse, non tamen tibi mandati tenetur. Et adeò hæc ita sunt, ut quæsitum sit, an mandati teneatur, qui mandavit tibi, ut pecuniam Titio fœnerares. Sed obtinuit Sabini sententia, obligatorium esse in hoc casu mandatum; quia non alitèr Titio credidisses, quam si tibi mandatum esset.

seems rather to be good advice, than a mandate, it is not obligatory; for no action of mandate can be brought against a man on account of advice, although it has not proved beneficial to him, to whom it was given; inasmuch as every one is at full liberty to consult his own reason, whether advice given be expedient or not. Therefore, if you should be advised to employ your money, which now lies dead, either by lending it at interest, or in making a purchase, and you shall become a loser by following this advice, the adviser would not be liable to an action. And this is so true, that it has even been a question, whether an action of mandate will lie against him, who hath required you by mandate to lend money to Titius, *who is insolvent. But the opinion of* Sabinus *hath obtained, and a mandate in this case is now judged to be obligatory; for you would never have trusted* Titius, *but in obedience to the mandate.*

De mandato contra bonos mores.

§ VII. Illud quoque mandatum non est obligatorium, quod contra bonos mores est; veluti si Titius de furto, aut de damno faciendo, aut de injuriâ faciendâ mandet tibi; licet enim pœnam istius facti nomine præstiteris, non tamen ullam habes adversus Titium actionem.

§ 7. *A mandate contrary to good manners is not obligatory; as if* Titius *should command you to commit theft, or to do injury to a third person; for, although you should be punished in consequence, you will not be intitled to any action against* Titius.

De executione mandati.

§ VIII. Is, qui exequitur mandatum, non debet excedere fines mandati; ut ecce, si quis usque ad

§ 8. *He, who executes a mandate ought not to exceed the bounds of it; for example, if a mandator should re-*

centum aureos mandaverit tibi, ut fundum emeres, vel ut pro Titio sponderes, neque pluris emere debes, neque in ampliorem pecuniam fidejubere ; alioqui non habebis cum eo mandati actionem : adeò quidem, ut Sabino et Cassio placuerit, etiamsiusque ad centum aureos cum eo agere volueris, inutiliter te acturum. Sed diversæ scholæ auctores rectè usque ad centum aureos te acturum existimant; quæ sententia sanè benignior est. Quod si minoris emeris, habebis scilicet cum eo mandati actionem ; quoniam, qui mandat, ut sibi centum aureorum fundus emeretur, is utique mandasse intelligitur, ut minoris, si possit, emeretur.

quire you to purchase lands, or to be bound for Titius, *to the amount of an hundred* aurei ; *you ought not to buy the lands at an higher price, or be bound for a greater sum ; otherwise, you will not be intitled to an action for the excess. And* CASSIUS *and* SABINUS *were even of opinion, that, although you should bring an action of mandate for no more than the hundred* aurei, *you could not recover them. But it was held by the lawyers of a different school, that the mandatory might sue the mandator for the hundred* aurei ; *and this appears to be the more equitable opinion. But, if you buy certain lands at a less price than that, which the mandator has allowed, you will undoubtedly be intitled to an action of mandate : for, if he hath ordered, that an estate should be purchased for an hundred* aurei, *he will certainly be understood, that it should if possible, be purchased at a less price.*

De revocatione mandati.

§ IX. Rectè quoque mandatum contractum, si, dum adhuc integra res sit, revocatum fuerit, evanescit.

§ 9. *A mandate, properly contracted, becomes null, if revoked before any act hath been done in consequence of it.*

De morte.

§ X. Item, si adhuc integro mandato mors alterius interveniat id est, vel ejus, qui mandaverit, vel illius, qui mandatum susceperit, solvitur mandatum. Sed utilitatis causâ receptum est, si eo mortuo, qui tibi mandaverat, tu, ignorans eum decessisse, executus fueris

§ 10. *A mandate also becomes null, if either the* mandator, *or the mandatary die, while it continues intire. But expedience has settled, that, if a mandator die, and the mandatary not knowing of his death, should afterwards execute the mandate, he may bring his action against the heirs of*

mandatum, posse te agere mandati actione; alioqui justa et probabilis ignorantia tibi damnum afferet. Et huic simile est, quod placuit, si debitores, manumisso dispensatore Titii, per ignorantiam liberto solverint, liberari eos; cum alioqui strictâ juris ratione non possent liberari: quia alii solvissent, quam cui solvere debuerint.

the mandator: *otherwise an unblamable want of knowledge would be prejudicial. And, in a similar case, it hath been determined, that, if the debtors of* Titius, *whose steward has been manumitted, without their knowledge, should pay this freedman what was due to* Titius, *they would be cleared from their debt; although, by the rigour of the law, it would be otherwise; since they had made their payment to another than him to whom it ought to have been made.*

De renunciatione.

§ XI. Madatum non suscipere cuilibet liberum est; susceptum autem consummandum est; aut quam primum renunciandum, ut per semetipsum, aut per alium, eandem rem mandator exequatur. Nam, nisi ita renuncietur, ut integra causâ mandatori reservetur eandem rem explicandi, nihilominus mandati actio locum habet; nisi justa causa intercesserit aut non renunciandi, aut intempestivè renunciandi.

§ 11. *Every man is at liberty to refuse a mandate; but once accepted, it must be performed, or renounced, as soon as possible, that the mandator may transact the business himself, or by another. For, if this be not so done that the mandator can have an opportunity of transacting the business properly, an action will lie against the mandatary, unless he can shew good cause for his delay in not making a timely renunciation.*

De die et conditione.

§ XII. Mandatum et in diem differi, et sub conditione fieri, potest.

§ 12. *A mandate may be put off to a distant day, or performed conditionally, (according to the contract.)*

De mercede.

§ XIII. In summâ sciendum est, mandatum, nisi gratuitum sit, in aliam formam negotii cadere: nam, mercede constitutâ, incipit locatio et conductio esse. Et, (ut

§ 13. *In fine, it must be observed, that, a mandate not gratuitous, becomes another species of contract: for, if a price be agreed upon, the contract of* location *and* conduction

generalitèr dicamus,) quibus casibus, sinè mercede suscepto officio, mandati sivè depositi contrahitur negotium, iis casibus interveniente mercede locatio et conductio intelligitur contrahi. Et ideò, si fulloni polienda curandave quis dederit vestimenta, aut sarcinatori sarcienda, nullâ mercede constitutâ, neque promissâ, mandati competit actio.

commences. And in general, when a trust or business is undertaken without hire, the contract regards either a mandate, *or a* deposit; *but, when there is an agreement for hire, it constitutes* location *and* conduction. *Therefore, if a man deliver his cloaths to a fuller to be cleaned, or to a taylor to be mended, and there is no agreement or promise made, an action of* mandate *will lie.*

TITULUS VIGESIMUS-OCTAVUS.

DE OBLIGATIONIBUS, QUÆ QUASI EX CONTRACTU NASCUNTUR.

Continuatio.

POST genera contractuum enumerata, dispiciamus etiam de iis obligationibus, quæ quidem non propriè nasci ex contractu intelliguntur; sed tamen, quia non ex maleficio substantiam capiunt, quasi ex contractu nasci videntur.

Having already enumerated the various kinds of direct obligations, we will now treat of those, which can not properly be said to arise from contract, but yet, as they take not their origin from any thing criminal, seem to arise from an implied, or a quasi-*contract.*

De negotiorum gestione.

§ I. Igitur, cum quis negotia absentis gesserit, ultro citroque inter eos nascuntur actiones, quæ appellantur negotiorum. Sed domino quidem rei gestæ adversus eum, qui gessit, directa competit actio; negotiorum autem gestori contraria; quas ex nullo contractu propriè nasci manifestum est: quippe ita nascuntur istæ actiones, si sinè

§ 1. *When one person transacts the business of another, who is absent, they reciprocally obtain a right to certain actions, called* actiones negotiorum gestorum; *i. e. on account of business done: and it is manifest, that these can arise from no proper or regular contract; for they take place only, when one man assumes the care of the affairs of another*

mandato quisque alienis negotiis gerendis se obtulerit; ex quâ causâ ii, quorum negotia gesta fuerint, etiam ignorantes obligantur. Idque utilitatis causâ receptum est, ne absentium, qui subitâ festinatione coacti, nulli demandatâ negotiorum suorum administratione, peregrè profecti essent, desererentur negotia; quæ sanè nemo curaturus esset, si de eo, quod quis impendisset, nullam habiturus esset actionem. Sicut autem is, qui utilitèr gessit negotia, dominum habet obligatum negotiorum gestorum, ita et contra iste quoque tenetur, ut administrationis reddat rationem; quo casu ad exactissimam quisque diligentiam compellitur reddere rationem: nec sufficit talem diligentiam adhibere, qualem suis rebus adhibere solet; si modo alius, diligentior eo, commodius administraturus esset negotia.

without a mandate: *and they for whom business is transacted, are thus bound without their knowledge; and this is permitted for the public good, because the business of persons absent in a foreign country, who have not entrusted their affairs to any particular person, would otherwise be totally neglected: for no man would take this care upon himself, if he could not afterwards bring an action to recover what he had expended. But, as the principal is bound to reimburse a careful agent, so is the latter bound to render a just account of his administration to his principal. And an agent, in this case, is obliged to use the most exact diligence; for it will not suffice, that he has taken the same care of the affairs of his principal, which he usually took of his own, if it appear, that a more diligent man could have managed to more advantage.*

De tutelâ.

§ II. Tutores quoque, quì tutelæ judicio tenentur, non propriè ex contractu obligati esse intelliguntur; nullum enim negotium inter tutorem et pupillum contrahitur. Sed, quia sanè non ex maleficio tenentur, quasi ex contractu teneri videntur; hoc autem casu mutuæ sunt actiones. Non tantum enim pupillus cum tutore habet tutelæ actionem; sed et contra tutor cum pupillo habet contrariam tutelæ, si vel impenderit aliquid in rem pupilli, vel pro eo fuerit obligatus,

§ 2. *A* tutor, *although subject to an action of* tutelage, *is not considered as bound by contract; for between a tutor and his pupil there is none. But as tutors are not subject to an action of mal-feasance, they are understood to be bound by an implied, or* quasi-*contract; and hence the right of action is reciprocal; the pupil may bring an action of tutelage against his tutor, and a tutor, who has expended his own money in the affairs of his pupil, or has been bound for him, or has mortgaged his own*

aut rem suam creditoribus ejus obligaverit.

possessions to the creditors, is intitled to the action called contraria tutelæ.

De rei communione.

§ III. Item, si inter aliquos communis res sit sinè societate, veluti quod pariter eis legata donatave esset, et alter eorum alteri ideò teneatur communi dividundo judicio, quod solus fructus ex eâ re perceperit, aut quod socius ejus solus in eam rem necessarias impensas fecerit, non intelligitur ex contractu propriè obligatus esse; quippe nihil inter se contraxerunt: sed, quia ex maleficio non tenetur, quasi ex contractu teneri videtur.

§ 3. *When property is in common among persons not partners, as when the same field, or part of an inheritance, is devised, or given generally between two; the one may be called to answer the other by the action* communi dividundo, *either for having taken to his use the whole produce of the ground; or because the other hath been at the sole expence of keeping it in good order. But neither can properly be said to be bound by contract, as they made no agreement between themselves; but, not being criminally liable, they are considered as bound by a* quasi-*contract.*

De hæreditatis communione.

§ IV. Idem juris est de eo, qui cohæredi familiæ erciscundæ judicio ex his causis obligatus est.

§ 4. *And the same law prevails as to him, who is bound to his coheir under the action* familiæ erciscundæ, *for the partition of an universal inheritance.*

De aditione hæreditatis.

§ V. Hæres quoque legatorum nomine non propriè ex contractu obligatus intelligitur; neque enim cum hærede, neque cum defuncto ullum negotium legatarius gessisse propriè dici potest; et tamen, quia ex maleficio non est obligatus, quasi ex contractu debere intelligitur.

§ 5. *An* heir *for the same reason cannot properly be said to be bound by contract to a* legatee, *who can not be supposed to have entered into any compact either with the heir, or the deceased: but, as the heir cannot be prosecuted by an action of* mal-feasance, *he is considered as liable to a* quasi-*contract.*

De solutione indebiti.

§ VI. Item is, cui quis per errorem non debitum solvit, quasi ex contractu debere videtur; adeò enim non intelligitur propriè ex contractu obligatus esse; ut, si certiorem rationem sequamur, magis (ut supra diximus) ex distractu quam ex contractu possit dici obligatus esse: nam, qui solvendi animo pecuniam dat, in hoc dare videtur, ut distrahat potius negotium, quam contrahat. Sed tamen perindè is, qui accepit, obligatur, ac si mutuum ei daretur; et ideò condictione tenetur.

§ 6. *He, to whom another has paid by mistake what was not due, appears to be indebted by* quasi-*contract; for he is certainly not bound by an express agreement: and, strictly speaking, he might rather be said, (as we have before observed,) to be bound by the dissolution than by the making of a contract; for he, who paid the money with an intent to discharge his debts, seemed rather inclined to dissolve an engagement, than to contract one. But, whoever receives money by the mistake of another, is as much bound to repayment, as if it had been lent him; and is therefore liable to an action of condiction.*

Quibus ex causis indebitum solutum non repetitur.

§ VII. Ex quibusdam tamen causis repeti non potest, quod per errorem non debitum solutum sit; sic namque definierunt veteres, ex quibus causis inficiando lis crescit, ex iis causis non debitum solutum repeti non posse; veluti ex lege Aquilia, item ex legato: quod veteres quidem in iis legatis locum habere voluerunt, quæ certa constituta per damnationem cuique legata fuerant: nostra autem constitutio, cum unam naturam omnibus legatis et fideicommissis indulsit, hujusmodi augmentum in omnibus legatis et fideicommissis extendi voluit: sed non omnibus legatariis hoc præbuit, sed tantummodo in iis legatis et fidei commissis, quæ sacrosanctis Ecclesiis, et cæteris

§ 7. *In some cases, money paid by mistake, cannot afterwards be demanded: for the ancient lawyers determined, that where an action for double the value of the debt is given upon the denial of it, (as by the law* Aquilia, *and in the case of legacies) the debtor, who has erroneously made payment to whom it was not due, shall never recover it. But these lawyers would have this rule to take place only in regard to fixed and certain legacies, devised* per damnationem. *But our constitution, which assigns to legacies and trusts, one common character, hath caused this augmentation in* duplum *after denial to be extended to legacies and trusts in general: yet the privilege of not refunding*

venerabilibus locis, quæ vel religionis vel pietatis intuitu honorantur, relicta sunt; quæ, si indebita solvantur, non repetuntur.

what is paid by mistake, is by our constitution only granted to churches and other holy places, which are honoured on account of religion and piety.

TITULUS VIGESIMUS-NONUS.

PER QUAS PERSONAS OBLIGATIO ACQUIRITUR.

C. iv. T. 27.

De his, qui sunt in potestate.

EXPOSITIS generibus obligationum, quæ ex contractu vel quasi ex contractu nascuntur, admonendi sumus, acquiri nobis non solùm per nosmetipsos, sed per eas quoque personas, quæ in nostrâ potestate sunt, veluti per servos et filios nostros; ut tamen, quod per servos nostros nobis acquiritur, totum nostrum fiat; quod autem per liberos, quos in potestate habemus, ex obligatione fuerit acquisitum, hoc dividatur secundum imaginem rerum, proprietatis, et ususfructûs, quam nostra decrevit constitutio: ut, quod ab actione commodum perveniat, hujus usumfructum quidem habeat pater, proprietas autem filio servetur, scilicet patre actionem movente, secundùm novellæ nostræ constitutionis divisionem.

Having explained the various kinds of obligations, arising from contracts or quasi-*contracts, we must now observe, that we acquire obligations not only by ourselves, but also by persons under our power; as by our slaves, and children. Whatever is acquired by our slaves is wholly our own; but what is acquired by children, under our power, by means of their contracts, must be divided according to our constitution, which gives to the father the usufruct, but reserves the property to the son. But a father, in bringing an action, must act in obedience to our novel constitution.*

De bonâ fide possessis.

§ I. Item per liberos homines et alienos servos, quos bonâ fide possidemus acquiritur nobis: sed tantùm ex duabus causis, id est, si quid exoperis suis, vel ex re nostrâ, acquirant.

§ 1. *We may also acquire by means of freemen, and the slaves of others, whom we possess* bonâ-fide: *but this only in two cases; to wit, when they have gained an acquisition by their labour, or by virtue of something, which belongs to us.*

De servo fructuario, vel usuario.

§ II. Per eum quoque servum, in quo usumfructum vel usum habemus, similiter ex duabus istis causis nobis acquiritur.

§ 2. *We may always acquire in either of the above named cases, by means even of those slaves, of whom we have only the usufruct or use.*

De servo communi.

§ III. Communem servum pro dominicâ parte dominis acquirere certum est excepto eo, quod nominatim uni stipulando, aut per traditionem accipiendo, illi soli acquirit; veluti cum ita stipulatur, *Titio domino meo dare spondes?* Sed, si domini unius jussu servus fuerit stipulatus, licèt antea dubitabatur, tamen post nostram decisionem res expedita est, ut illi tantùm acquirat, qui hoc ei facere jussit, ut supra dictum est.

§ 3. *It is certain, that a slave, who is in common between two or more, acquires for his masters in proportion to their property in him; unless he stipulate, or receive in the name of one of them only; as,* do you promise to give such a thing to TITIUS my master? *for although it was a doubt in times past, whether a slave, when commanded, could stipulate for one of his masters; yet, it is now settled by our decision, that a slave may acquire for him only, who hath ordered the stipulation.*

TITULUS TRIGESIMUS.

QUIBUS MODIS TOLLITUR OBLIGATIO.

D. iv. T. 2, 3, 4. C. viii. T. 42, 43, 44.

De solutione.

TOLLITUR autem omnis obligatio solutione ejus, quod debetur; vel si quis consentiente creditore aliud pro alio solverit. Nec interest, quis solvat, utrum ipse, qui debet, an alius pro eo; liberatur enim et alio solvente, sivè sciente, sivè ignorante debitore, vel invito eo solutio fiat. Item, si reus solverit, etiam ii, qui pro eo intervenerunt, liberantur. Idem ex contrario contingit, si fide-jussor solverit; non enim ipse solus liberatur, sed etiam reus.

An obligation is dissolved by the payment of what is due; or by the payment of one thing for another, if the creditor consent; nor is it material whether payment be made by the debtor himself, or by another for him; for the debt is discharged when another has paid it, either with or without the knowledge, or even against the consent of the debtor. So, when a debtor pays his creditors, his sureties are freed: on the other hand when a surety discharges his obligation, he not only becomes free himself, but he discharges the principal debtor also.

De acceptilatione.

§ 1. Item per acceptilationem tollitur obligatio: est autem acceptilatio imaginaria solutio: quod enim ex verborum obligatione Titio debetur, id, si velit Titius remittere, poterit sic fieri, ut patiatur hæc verba debitorem dicere: *quod ego tibi promisi, habesne acceptum?* et Titius respondeat, *habeo.* Sed et Græcè potest acceptilatio fieri; dummodo sic fiat, ut Latinis verbis solet; ἔχεις λαβεῖν δηνάρια τόσα. ἔχω λαβεῖν. Quo genere, (ut diximus,) tantum eæ solvuntur obligationes, quæ ex verbis consistunt, non etiam cæteræ. Consentaneum enim visum

§ 1. *An obligation is also dissolved by* acceptilation *or acknowledgement; which is an imaginary payment: for, if* Titius *be willing to remit what is due to him by a verbal contract, it may be done, if the debtor should say,* do you consider what I promised you, as accepted and received? *and* Titius *answer,* I do. *An* acceptilation *may also be made in Greek, if it be so worded, as to agree with the Latin form;* do you acknowledge to have received so many Denarii? I do. *But verbal contracts only are thus dissolved: and it seems proper that an obliga-*

est, verbis factam obligationem aliis posse verbis dissolvi. Sed et id, quod aliâ ex causâ debetur, potest in stipulationem deduci, et per acceptilationem dissolvi. Sicut etiam quod debetur pro parte rectè solvitur; ita in parte debiti, acceptilatio fieri potest.

tion, verbally created, may be dissolved by other words of a contrary import. But it is observable, that any species of contract may be reduced to a stipulation, and of course dissolved by acceptilation. *As a debt may be paid in part by money, it may be discharged in part also by* acceptilation.

De Aquilianâ stipulatione et acceptilatione.

§ II. Est autem prodita stipulatio, quæ vulgò Aquilianâ appellatur, per quam contingit, ut omnium rerum obligatio in stipulatum deducatur, et ea per acceptilationem tollatur. Stipulatio enim Aquilianâ renovat omnes obligationes, et à Gallo Aquilio ita composita est. *Quicquid te mihi ex quacqunque causa dare facere oportet oportebitve, præsens in diemve, aut sub conditione; quarumcunque rerum mihi tecum actio est, quæque adversus te petitio, vel adversus te persecutio, est erîtve; quodve tu meum habes, tenes, possides, dolove malo fecisti, quo minus possideas; quanti quæque earum rerum res erit, tantam pecuniam dari stipulatus est Aulus Agerius, spopondit, Numerius Nigidius. Quod Numerius Nigidius Aulo Agerio spopondit, id haberetne a se acceptum Numerius Nigidius Aulum Agerium rogavit: Aulus Agerius Numerio Nigidio acceptum fecit.*

§ 2. *There is another species of stipulation, called commonly the* Aquilian, *by virtue of which every other kind of obligation may be reduced to a stipulation, and may afterwards be dissolved by* acceptilation. *For the* Aquilian *stipulation changes all obligations, and was constituted by* GALLUS AQUILIUS *in the following manner.* Do you promise, *said* AULUS AGERIUS to NUMERIUS NIGIDIUS, to pay me a sum of money, in lieu of what you was, or shall be, obliged to give me, or to perform for my benefit, either simply, at a day to come, or upon condition; and in lieu of those things, which, being my property, you HAVE, DETAIN, or POSSESS; or of which you have fraudulently quitted the possession; and for which I may, or shall be, intitled to any species of action, plaint, or prosecution; NUMERIUS NIGIDIUS *answered*, I do: *and, when this was said*, NUMERIUS NIGIDIUS asked AULUS AGERIUS, if he acknowledged the money as accepted and received, which he (NUMERIUS) had promised? *to which* AULIUS AGERIUS *answered*, that he did so acknowledge it.

De Novatione.

§ III. Præterea, Novatione tollitur obligatio; veluti si id, quod tibi Seius debebat, à Titio stipulatus sis. Nam interventu novæ personæ nova nascitur obligatio, et prima tollitur, translata in posteriorem: adeò ut interdùm, licèt posterior stipulatio inutilis sit, tamen prima novationis jure tollatur; veluti si id, quod tu Titio debes, à pupillo sinè tutoris auctoritate stipulatus fuerit; quo casu res amittitur: nam et prior debitor liberatur, et posterior obligatio nulla est. Non idem juris est, si à servo quis fuerit stipulatus: nam tunc prior perindè obligatus manet, ac si postea nullus stipulatus fuisset. Sed, si eadem persona sit, à quâ postea stipuleris, ita demum novatio fit, si quid in posteriore stipulatione novi sit; fortè si conditio aut dies aut fidejussor adjiciatur aut detrahatur. Quod autem diximus, si conditio adjiciatur, novationem fieri, sic intelligi oportet, ut ita dicamus factam novationem, si conditio extiterit; alioqui, si defecerit, durat prior obligatio. Sed, cum hoc quidem inter veteres constabat, tunc fieri novationem, cum novandi animo in secundam obligationem itum fuerat, per hoc autem dubium erat, quando novandi animo vitetur hoc fieri, et quasdam de hoc præsumptiones alii in aliis casibus introducebant, ideò nostra processit constitutio, quæ apertissimè definivit, tunc solum novationem prioris

§ 3. *An obligation is also dissolved by* novation; *as when you stipulate with* TITIUS *to receive from him what is due to you from* SEIUS. *For, by the intervention of a new debtor, a fresh obligation arises, by which the former is discharged, and transferred to the latter. Sometimes, although the latter be of no force, yet the prior contract is discharged by the mere act of* novation: *as if* TITIUS *should stipulate to receive what I owe him, from a pupil without authority of his tutor; here the debt is lost, because the first debtor is freed, and the second obligation is void: but it is not so if a man contract by stipulation with a slave, (intending a* novation;*) for then the first debtor remains bound, as if there had been no second stipulation. And, if you stipulate from the same person a second time, a* novation *arises, if any thing new be contained in the latter stipulation; as a condition, a day, or a bondsman added, or taken away. But when a condition only is added,* novation *does not take place, till the event happen; and, till then, the prior obligation continues. The ancient lawyers held that a* novation *arose, when a second contract was intended to dissolve a former; but it was always difficult to know with what intent the second obligation was made; and for want of positive proof, opinions were founded on presumptions, arising from the cir-*

obligationis fieri, quoties hoc ipsum inter contrahentes expressum fuerit, quod propter novationem prioris obligationis convenerunt; alioqui et manere pristinam obligationem, et secundam ei accedere, ut maneat ex utrâque causâ obligatio, secundùm nostræ constitutionis definitionem, quam licet ex ipsius lectione apertius cognoscere.

cumstances of each case. This incertainty gave rise to our constitution, which enacts that a novation *of a former contract shall only take place, when it is expressed by the contractors, that they covenanted with this intent; otherwise the first contract shall continue valid, and the second be regarded as an accession to it; so that an obligation may remain under both contracts, as may be better known by perusing our constitution on this subject.*

De contrario consensu.

§ IV. Hoc amplius, eæ obligationes, quæ consensu contrahuntur, contrariâ voluntate dissolvuntur. Nam, si Titius et Seius inter se consenserint, ut fundum Tusculanum emptum Seius haberet centum aureis, deinde, re nondum secutâ, (id est, neque pretio soluto, neque fundo tradito,) placuerit inter eos, ut discederetur ab eâ emptione et venditione, invicèm liberantur. Idem est in conductione et locatione, et in omnibus contractibus, qui ex consensu descendunt, sicùt jam dictum est.

§ 4. *Farther, obligations contracted by consent, may be dissolved by dissent. For, if* Titius *and* Seius *have agreed that* Seius *shall have a certain estate for an hundred* aurei, *and afterwards before execution, that is, before payment, or livery of the land, the parties dissent from their agreement, they are mutually discharged. The same may be said of* location *and* conduction, *and of all other contracts, which arise from consent.*

FINIS LIBRI TERTII.

DIVI JUSTINIANI

INSTITUTIONUM

LIBER QUARTUS.

TITULUS PRIMUS.

DE OBLIGATIONIBUS, QUÆ, EX DELICTO NASCUNTUR.

D. xlvii. T. 2. C. vi. T. 2.

Continuatio et divisio obligationum ex delicto.

CUM sit expositum superiore libro de obligationibus ex contractu et quasi ex contractu, sequitur, ut de obligationibus ex maleficio et quasi ex maleficio dispiciamus. Sed illæ quidem, ut suo loco tradidimus, in quatuor genera dividuntur; hæ vero unius generis sunt: nam omnes ex re nascuntur, id est, ex ipso maleficio; veluti ex furto, rapinâ, damno, injuriâ.

Having explained in the preceding book the nature of obligations, which arise from contracts and quasi-*contracts, it follows, that we should here treat of those, which arise from male-feasance and* quasi-*male-feasance. The former, as we have shewn in the proper place, are divided into four species; but the latter are of one kind only; for they all arise* ex re, *that is, from the crime or male-feasance itself; as from theft, rapine, damage, injury.*

Definitio furti.

§ I. Furtum est contrectatio fraudulosa, lucri faciendi gratiâ, vel ipsius rei, vel etiam usûs ejus, possessionisve: quod lege naturali prohibitum est admittere.

§ 1. *Theft, is the taking, using, or possessing any thing by fraud for the sake of gain. And this is prohibited by the law of nature.*

Etymologia.

§ II. Furtum autem vel à furvo, id est, nigro, dictum est, quod clàm et obscurè fiat, vel plerùmque nocte: vel à fraude: vel à ferendo, id est, auferendo: vel à Græco sermone, quod φῶρας appellant fures: imo et Græci, ἀπὸ τῦ φέρειν, φῶρας dixerint.

§ 2. *The word* furtum [*theft*] *is derived from* furvum; [*black or dark;*] *because theft is committed privately, and generally in the night:* ——*or from* fraus [*fraud*] a ——*or from* ferendo, *i. e.* (auferendo) *and denotes a substraction, or taking away. Or perhaps from the* Greek; *for the* Greeks *call* fures, φῶρας, *from* φέρειν, to take away.

Divisio.

§ III. Furtorum autem duo sunt genera; *manifestum* et *nec manifestum:* nam conceptum et oblatum species potius actionis sunt furto cohærentes, quam genera furtorum, sicùt inferius apparebit. Manifestus fur est, quem Græci ἐπ' αὐτοφώρῳ appellant: nec solùm is, qui in ipso furto deprehenditur, sed etiam is, qui eo loco deprehenditur, quo furtum fit; veluti qui in domo furtum fecit, et, nondùm egressus januam, deprehensus fuerit: et qui in oliveto olivarum, aut in vineto uvarum, furtum, fecit, quamdiu in eo oliveto aut vineto deprehensus fuerit. Imò ulterius furtum manifestum est extendendum, quamdiu eam rem fur tenens visus vel deprehensus fuerit, sivè in publico, sivè in privato, vel à domino, vel ab alio, antequam eo pervenerit, quo deferre vel deponere destinasset. Sed, si pertulit, quo destinavit, tametsi deprehendatur cum re furtivâ, non est manifestus fur. Nec manifestum furtum quid sit, ex iis, quæ diximus, intelligitur; nam quod manifestum

§ 3. *Of theft there are two kinds,* manifest *and not* manifest: *for the thefts, called* conceptum *and* oblatum, *rather denote the kind of action connected with theft, than the kind of theft; as will appear in the next paragraph. A manifest thief, whom the* Greeks *call* ἐπ' αὐτοφώρῳ, *is he, who is taken in the act of thieving, or in the place, where he committed it; as if a man, having committed a theft within a house, should be apprehended before he had passed the outward door: or, having stolen grapes or olives, should be taken in the vineyard or olive orchard. Manifest theft is also farther extended; for, if the thief be apprehended, while seen in possession of the thing stolen, or if he be taken in public or in private, by the owner or by a stranger, at any time before his arrival at the place, to which he proposed to carry it, he is guilty of a manifest theft. But if he actually arrive, before apprehension, at the place proposed, then, although the thing stolen be found upon him, he is not a manifest thief. By this de-*

non est, id scilicet nec manifestum est.

scription of manifest *theft, may be understood what is theft* not manifest.

De furto concepto, oblato, prohibito, non exhibito.

§ IV. Conceptum furtum dicitur, cum apud aliquem, testibus præsentibus, furtiva res quæsita et inventa sit: nam in eum propria actio constituta est, quamvis fur non sit; quæ appellatur concepti. Oblatum furtum dicitur, cum res furtiva ab aliquo tibi oblata sit, eaque apud te concepta sit; utique si eâ mente tibi data fuerit, ut apud te potius, quam apud eum, qui dedit, conciperetur: nam tibi, apud quem concepta sit, propria adversus eum, qui obtulit, quamvis fur non sit, constituta est actio, quæ appellatur oblati. Est etiam prohibiti furti actio, adversus eum, qui furtum quærere testibus præsentibus volentem prohibuerit. Præterea pœna constituitur edicto prætoris per actionem furti non exhibiti adversus eum, qui furtivam rem apud se quæsitam et inventam non exhibuit. Sed hæ actiones, scilicet concepti, et oblati, et furti prohibiti, nec non furti non exhibiti, in desuetudinem abierunt. Cum enim requisitio rei furtivæ hodie secundùm veterem observationem non fiat, meritò ex consequentiâ, etiam præfatæ actiones ab usu communi recesserunt; cum manifestum sit, quod omnes, qui scientes rem furtivam susceperint, et celaverint, furti nec manifesti obnoxii sunt.

§ 4. *A theft is called* conceptum [i. e. *found*] *when a thing stolen is searched for and found upon some person in the presence of witnesses; and a particular action, called* actio concepti, *lies against such possessor, although he did not commit the theft. A theft is called* oblatum, [i. e. *offered,*] *when a thing stolen is offered to* Titius, *and found upon him, it having been given to him by* Seius, *with intent that it might rather be found upon* Titius *than upon himself: and in this case a special action, called* actio oblati, *may be brought by* Titius *against* Seius, *although* Seius *was not guilty of the theft. The action, called* prohibiti furti, *also lies against him, who prevents another from inquiring of theft in the presence of witnesses. And further, a penalty was appointed by prætorian edict to be sued by the action* furti non exhibiti *against any man for not having produced things stolen, which upon search were found to have been in his possession. But these four actions are become quite obsolete; for, since a search after things stolen is not now made according to ancient formalities, these actions have in consequence ceased to be in use; for it is a settled point, that all, who knowingly have received and concealed a thing stolen, are subject to the penalty of theft* not manifest.

Pœna.

§ V. Pœna *manifesti furti* quadrupli est, tam ex servi, quam ex liberi personâ; *nec manifesti*, dupli.

§ 5. *The penalty of committing* manifest *theft, is quadruple, whether the thief be bond or free; the penalty of theft* not manifest, *is double the value of the thing stolen.*

Quomodo furtum fit; de contrectatione.

§ VI. Furtum autem fit, non solùm cum quis intercipiendi causâ rem alienam amovet; sed generaliter, cum quis alienam rem, invito domino, contrectat. Itaque sivè creditor pignore, sivè is, apud quem res deposita est, eâ re utatur; sivè is, qui rem utendam accepit, in alium usum eam transferat, quam cujus gratiâ ei data est, furtum committit; veluti, si quis argentum utendum acceperit, quasi amicos ad cœnam invitaturus, et id peregrè secum tulerit; aut si quis equum, gestandi causâ commodatum sibi, longius aliquo duxerit: quod veteres scripserunt de eo, qui in aciem equum perduxisset.

§ 6. *Theft is committed not only, when one man removes the property of another to appropriate it to himself, but also generally, when one man uses the property of another against the will of the proprietor; thus, if a creditor uses a pledge, or a depositary the deposit left with him, or if he who hath only the use of a thing for a special purpose, converts it to other uses, a theft is committed. If any one borrows plate under pretence of using it at an entertainment of his friends, and then carries it away to a foreign country—or borrows a horse, and rides it farther than he ought, theft is also committed: and the ancients extended this to him, who rides a borrowed horse into a field of battle.*

De affectu furandi.

§ VII. Placuit tamen, eos, qui rebus commodatis aliter uterentur, quam utendas acceperint, ita furtum committere, si se intelligant id, invito domino, facere; eumque, si intellexisset, non permissurum: at, si permissurum credant, extra crimen videri, optimâ sanè distinctione;

§ 7. *But it hath been adjudged, that whoever applies a thing borrowed to other uses than those for which he borrowed it, is not guilty of theft, unless the borrower knew, that he so applied it contrary to the will of the owner, who would not have permitted such application, if*

quia furtum sinè affectu furandi non committitur.

he had been apprized of it. But it should seem, that the borrower is not guilty, if it appear, that he relied on the owner's consent. And this is a good distinction; for a theft can never be committed, unless there appear to have been an intention of stealing.

De voluntate domini.

§ VIII. Sed et, si credat aliquis, invito domino, se rem commodatam sibi contrectare, domino autem volente id fiat, dicitur furtum non fieri. Unde illud quæsitum est, cum Titius servum Mævii solicitaverit, ut quasdam res domino surriperet, et ad eam perferret, et servus id ad dominum pertulerit; Mævius autem, dum vult Titium in ipso delicto deprehendere, permisserit servo quasdam res ad eum perferre; utrum furti, an servi corrupti, judicio teneatur Titius, an neutro? Et cum nobis super hac dubitatione suggestum est, et antiquorum prudentium super hoc altercationes perspeximus, quibusdam neque furti, neque servi corrupti, actionem præstantibus, quibusdam furti tantummodo, nos, hujusmodi calliditati obviam euntes, per nostram constitutionem sancimus, non solum furti actionem, sed et servi corrupti contra eum dari. Licet enim is servus deterior à solicitatore minimè factus est, et ideò non concurrant regulæ, quæ servi corrupti actionem introducunt; tamen consilium corruptoris ad perniciem probitatis servi introductum est,

§ 8. *But, if a man use a thing borrowed against the will of the owner as he believes, but who in reality consents that it should be so used, theft is not committed: hence arises a question on the following case.* Titius *solicited the slave of* Mævius *to rob his master, and to bring him the things stolen; of this the slave informed his master, who, being desirous of catching* Titius *in the fact, permitted the slave to carry certain things to* Titius, *as stolen; will* Titius *be subject to an action of theft, or to an action for having corrupted a slave, or to neither? When this was proposed to us as a matter of doubt, and we examined the altercations of antient lawyers upon the point, some of them allowing of neither of the before-named actions, and others allowing an action of theft only, we, being willing to obviate all subtilities, decreed that not only an action of theft might be brought, but also the action* servi corrupti, *which lies for having corrupted a slave. For although the slave became not the worse for the solicitation, and therefore the causes, which introduce the action* servi corrupti, *do not*

ut sit ei pœnalis actio imposita, tanquam si re ipsâ fuisset servus corruptus; ne ex hujusmodi impunitate et in alium servum, qui facilè possit corrumpi, tale facinus à quibusdam perpetretur.

concur; yet inasmuch as such solicitation was intended to corrupt, it hath therefore pleased us, that a penal action shall lie against the party soliciting, in the same manner as if he had actually succeeded by corrupting the slave; lest impunity might encourage evil-disposed persons to make the same attempt upon other slaves, who might be more easily corrupted.

Quarum rerum furtum fit. De liberis hominibus.

§ IX. Interdùm etiam liberorum hominum furtum fit; veluti si quis liberorum nostrorum, qui in potestate nostrâ sunt, surreptus fuerit.

§ 9. *A theft may be committed even of free persons; as, for instance, when children who are under power, are surreptitiously taken from their parents.*

De re propria.

§ X. Aliquando etiam suæ rei furtum quis committit; veluti si debitor rem, quam creditori pignoris causa dedit, subtraxerit.

§ 10. *A man may also commit a theft of his own property; as when a debtor takes away the pledge left with his creditor.*

Qui tenentur furti. De eo, cujus ope, consilio, furtum factum est.

§ XI. Interdùm quoque furti tenetur, qui ipse furtum non fecit; qualis est is, cujus ope et consilio furtum factum est. In quo numero est, qui tibi nummos excussit, ut alius eos raperet; aut tibi obstiterit, ut alius rem tuam exciperet; aut oves tuas, vel boves fugaverit, ut alius eas acciperet. Et hoc veteres scripserunt de eo, qui panno rubro fugavit armentum. Sed, si quid eorum per lasciviam, et non datâ operâ, ut furtum admitteretur, factum est, in factum actio dari debet.

§ 11. *An action of theft will, in some cases, lie against persons, who did not actually commit the theft; as against those, by whose aid and advice the theft was committed: whoever strikes money out of your hand, to the intent that another may pick it up; or so obstructs you, as to enable his accomplice to take your sheep, oxen, or any part of your property, must be regarded as an aider and abettor. The ancient lawyers also included him in this number, who frightened away a herd from its pasture*

At, ubi ope Mævii Titius furtum fecerit, ambo furti tenentur. Ope et consilio ejus quoque furtum admitti videtur, qui scalas forte fenestris supponit, aut ipsas fenestras vel ostium effringit, ut alius furtum faceret; quive ferramenta ad effringendum, aut scalas, ut fenestris supponerentur, commodaverit; sciens, cujus rei gratiâ commodaverit. Certè, qui nullam opem ad furtum faciendum adhibuit, sed tantum consilium dedit, atque hortatus est ad furtum faciendum, non tenetur furti.

with a red cloth. But, if a man should do any of these acts wantonly, and without intention of thieving, then an action can lie only in factum; i. e. *upon the case, or the fact done: but, when* Titius *commits theft by the aid of* Mævius, *they are both subject to an action of theft. Theft seems to be committed both by aid and advice, when a man puts a ladder to a window, or breaks open a door or window, to the intent, that another may commit theft; or when one man lends another iron bars, or ladders, knowing the bad purposes to which they are to be applied. But it is certain, that he, who hath afforded no actual assistance, but hath only given his council by advising the crime, is not liable to an action of theft.*

De his, qui sunt in potestate. Et de ope ac consilio extranei.

§ XII. Hi, qui in parentum vel dominorum potestate sunt, si rem eis surripiunt, furtum quidem faciunt, et res in furtivam causam cadit; nec ob id ab ullo usucapi potest, antequam in domini potestatem revertatur: sed furti actio non nascitur; quia nec ex aliâ ullâ causâ potest inter eos actio nasci. Si verò ope et consilio alterius furtum factum fuerit, quia utique furtum committitur, convenienter ille furti tenetur: quia verum est, ope et consilio ejus furtum factum esse.

§ 12. *When persons under the power of parents or masters take from them any thing surreptitiously, it is considered that a theft is committed; so that it cannot be prescribed to, by any one, until it hath first reverted into the power of the owner; and yet an action of theft will not lie; for no action lies between parents and children, or masters and slaves. But if the fact were done by the aid and advice of any other, inasmuch as a theft is committed, an action of theft will lie against the* accessary.

Quibus datur actio furti.

§ XIII. Furti autem actio ei competit, cujus interest rem salvam esse, licèt dominus non sit: itaque nec domino aliter competit, quam si ejus intersit, rem non perire.

§ 13. *An action of theft may be brought by any man, who has an interest in the safety of the thing stolen, although he be not the proprietor: and the proprietor himself can have no action, unless he have an interest.*

De pignore surrepto creditori.

§ XIV. Unde constat creditorem de pignore surrepto furti actione agere posse, etiamsi idoneum debitorem habeat; quia expedit ei pignori potius incumbere, quam in personam agere: adeo quidem ut, quamvis ipse debitor eam rem surripuerit, nihilominus creditori competat actio furti.

§ 14. *Hence, a creditor may bring this action for a pledge stolen, although his debtor be solvent; because it may be more expedient for him to rely upon his pledge, than to bring suit against his debtor; and, although the debtor himself should have purloined the pledge, yet an action of theft will lie against him.*

De re fulloni, vel sarcinatori, vel bonæ fidei emptori, surreptâ.

§ XV. Item si fullo polienda curandave, aut sarcinator sarcienda, vestimenta mercede certâ constitutâ acceperit, eaque furto amiserit, ipse furti habet actionem, non dominus; quia domini nihil interest, eam rem non perire; cum judicio locati à fullone, aut sarcinatore, rem suam persequi possit. Sed et bonæ fidei emptori surreptâ re, quam emerit, quamvis dominus non sit, omninò competit furti actio, quemadmodum et creditori. Fulloni verò et sarcinatori non aliter furti actionem competere placuit, quam si solvendô fuerint; hoc est, si domino rei æstimationem solvere possint. Nam, si solvendo non sint, tunc, quia ab eis suum consequi non possit, ipsi domino furti competit ac-

15. *A fuller who receives cloaths to clean, which are stolen from him, may bring an action of theft, but not the owner; for the owner is not considered as interested in their safety, having a right of action, called* locati *against the fuller. But, if a thing be stolen from a* bonâ fide *purchaser, he is intitled, like a creditor, to an action of theft, although he be not the proprietor. But an action of theft is not maintainable by the fuller, or any tradesman in similar circumstances, unless he be solvent; that is, unless he be able to pay the owner the full value of the thing lost: for, if the fuller be insolvent, then the owner, who cannot recover from the fuller, is allowed to bring an action of theft,*

tio; quia hoc casu ipsius interest, rem salvam esse. Idem est, etsi in parte solvendo fuerit fullo aut sarcinator.

having in this case an interest. And this although the tradesman be partially solvent.

De re commodatâ.

§ XVI. Quæ de fullone et sarcinatore diximus, eadem et ad eum, cui commodata res est, transferenda, veteres existimabant. Nam ut ille fullo, mercedem accipiendo, custodiam præstat, ita is quoque, qui commodatum utendi causâ accepit, similiter necesse habet custodiam præstare. Sed nostra providentia etiam hoc in nostris decisionibus emendavit, ut in domini voluntate sit, sivè *commodati* actionem adversus eum, qui rem commodatam accepit, movere desiderat, sivè *furti* adversus eum, qui rem surripuit; et, alterutrâ earum electâ, dominum non posse ex pœnitentiâ ad alteram venire actionem: sed, si quidem furem elegerit, illum, qui rem utendam accepit, penitùs liberari; sin autem commodator veniat adversus eum, qui rem utendam accepit, ipsi quidem nullo modo competere posse adversus furem furti actionem; eum autem, qui pro re commodatâ convenitur, posse adversus furem furti habere actionem; ita tamen, si dominus, sciens rem esse surreptam, adversus eum, cui res commodata fuerit, pervenit. Sin autem nescius et dubitans, rem esse surreptam, apud eum commodati actionem instituerit: postea autem, re compertâ, voluerit remittere quidem

§ 16. *The ancients were of opinion, that what we have said of a tradesman is equally applicable to a borrower. For as the fuller, by agreeing for a certain price, is obliged to answer for the cloaths committed to his care, so is he who receives a loan for the sake of using it, under the like necessity of preserving it. But we have amended the law in this point by our decisions, so that it is now at the will of the owner either to bring an action of theft against the thief, or an action on account of the thing lent, against the borrower. But, if the owner once make an election, he can not afterwards have recourse to the other remedy; if he prosecutes the thief, the borrower is discharged; if he brings suit against the borrower, he can not sue the thief. But the borrower, who is sued on account of the thing lent, may bring an action of theft against the thief, if the owner suing were apprized, that the thing was stolen; but, if the owner, either not knowing or doubting of the theft, institute an action of loan against the borrower, and afterwards upon information is willing to withdraw it, and recur to an action of theft, he shall have liberty, in consideration of his incertainty, to prosecute the thief without obstacle, if the borrow-*

commodati actionem, ad furti autem actionem pervenire, tunc licentia ei concedatur et adversus furem venire, obstaculo nullo ei opponendo; quoniam incertus constitutus movit adversus eum, qui rem utendam accepit, commodati actionem; nisi domino ab eo satisfactum fuerit: tunc etenim omninò furem à domino quidem furti actione liberari; suppositum autem esse ei, qui pro re sibi commodatâ domino satisfecit; cum manifestissimum sit, etiamsi ab initio dominus actionem commodati instituerit, ignarus rem esse surreptam, postea autem, hoc ei cognito, adversus furem transierit, omninò liberari eum, qui rem commodatam acceperit, quemcunque causæ exitum dominus adversus furem habuerit: eadem definitione obtinente, sivè in parte, sivè in solidum solvendo sit is, qui rem commodatam acceperit.

er has not satisfied his demand; but if he has, then the thief is freed from any action of theft by the owner and remains subject to the prosecution of the borrower, who hath satisfied the owner. But it is most manifest, that if the owner of any particular thing not knowing, that it is stolen, should at first institute an action of loan against the borrower, but should afterwards, upon better information, chuse to pursue the thief by an action of theft, the borrower is secure, whatever may be the issue of the action brought against the thief. And this is law, whether the borrower be able to answer the whole, or a part only, of the value of the thing.

De re depositâ.

§ XVII. Sed is, apud quem res deposita est, custodiam non præstat; sed tantum in eo obnoxius est, si quid ipse dolo malo fecerit: qua de causâ, si res ei surrepta fuerit, quia restituendæ ejus rei nomine depositi, non tenetur, nec ob id ejus interest rem salvam esse, furti agere non potest: sed furti actio domino competit.

§ 17. *A depositary is not obliged to make good the thing deposited, unless he be himself guilty of some fraud; and therefore, as he is not obliged to make restitution, when the deposit is stolen, and has consequently no interest in the preservation of it, he can not bring an action of theft, which in this case can only be maintained by the owner.*

An impubes furti teneatur.

§ XVIII. In summâ sciendum est, quæsitum esse, an impubes rem alienam amovendo furtum faciat?

§ 18. *It hath been a question, whether a person within puberty, taking away the property of another*

Et placuit, quia furtum ex effectu furandi consistit, ita demùm obligari eo crimine impuberem, si proximus pubertati sit, et ob id intelligat se delinquere.

can be guilty of theft? And it hath been determined, that as theft consists in the intention of defrauding, a person approaching to puberty and sensible of doing wrong, may be charged with theft.

Quid veniat in hanc actionem; et de affinibus actionibus.

§ XIX. Furti actio, sivè dupli, sivè quadrupli, tantum ad pœnæ persecutionem pertinet: nam ipsius rei persecutionem extrinsecus habet dominus, quam aut vindicando aut condicendo potest auferre. Sed rei vindicatio quidem adversus possessorem est, sivè fur ipse possidet, sivè alius quilibet; condictio autem adversus furem ipsum, hæredemve ejus, licèt non possideat, competit.

§ 19. *An action of theft can only be brought for the penalty, whether double or quadruple: for the owner may recover the thing itself, either by vindication or condiction. An action of vindication may be brought either against the thief or any other in possession; but condiction is maintainable only against the thief himself, or his heir; and it will lie against either of them, whether in possession of the thing stolen, or not.*

TITULUS SECUNDUS.

DE VI BONORUM RAPTORUM.

D. xlvii. T. 8. C. ix. T. 33.

Origo hujus actionis, et quid in eam veniat.

QUI vi res alienas rapit, tenetur quidem etiam furti; (quis enim magis alienam rem, invito domino, contrectat, quam qui vi rapit? ideoque rectè dictum est, eum improbum furem esse;) sed tamen proprium actionem ejus delicti nomine prætor introduxit, quæ appellatur *vi bonorum raptorum;* et est intra annum quadrupli, post annum sim-

He who takes the property of another by force, is liable to an action of theft; [for who can be said to take the property of another more against his will, than he, who takes it by force? it is therefore rightly observed, that he is a thief of the worst kind:] the prætor however, hath introduced a peculiar action in this case, called vi bonorum rapto-

pli; quæ actio utilis est, etiamsi quis unam rem, licet minimam, rapuerit. Quadruplum autem non totum pœna est, sicùt in actione furti manifesti diximus; sed in quadruplo inest et rei persecutio; ut pœna tripli sit, sivè comprehendatur raptor in ipso delicto, sivè non. Ridiculum enim esset, levioris conditionis esse eum, qui vi rapit, quam qui clam amovet.

rum; *which, if brought within a year after the robbery, inforces the payment of the quadruple value of the thing taken; but, if brought after the expiration of a year, then the single value only is claimable; and this action may be brought for any single thing, though of the smallest value, if taken by force. But the quadruple value is not altogether penalty, as in an action of* manifest theft; *for the thing itself is included, so that, strictly, the penalty is only threefold; but then it is inflicted without distinguishing whether the robber was, or was not taken in the actual commission of the fact. For it would be ridiculous, that a robber, who uses force, should be in a better condition, than he, who is only guilty of clandestine theft.*

Adversus quos datur.

§ I. Ita tamen competit hæc actio, si dolo malo quis rapuerit; nam, qui alieno errore ductus, rem suam esse existimans, et imprudens juris, eo animo rapuerit, quasi domino liceat etiam per vim rem suam auferre à possessoribus, absolvi debet: cui scilicèt conveniens est, nec furti teneri eum, qui eodem hoc animo rapuit. Sed, ne, dum talia excogitantur, inveniatur via, per quam raptores impunè suam exerceant avaritiam, melius divalibus constitutionibus pro hac parte prospectum est, ut nemini liceat vi rapere vel rem mobilem, vel se moventem, licèt suam eandem rem existimet. Sed, si quis contra sta-

§ 1. *This action is maintainable also on the ground of fraud: but if a man, ignorant of the law and erroneously deeming some particular thing to be his own, should take it away by force from the possessor, upon full persuasion that he, as proprietor, could justify such a proceeding, he ought to be acquitted upon this action: neither is he subject, under these circumstances, to an action of theft. But, lest robbers should from hence find out a way of practising their villanies with impunity, it is provided by the imperial constitutions, that no man shall take by force any moveable thing, or living creature, although he believes it*

uta principum fecerit, rei quidem suæ dominio cadere; sin autem aliena res sit, post restitutionem ejus, etiam æstimationem ejusdem rei præstare. Quod non solùm in mobilibus rebus, quæ rapi possunt, constitutiones obtinere censuerunt, sed etiam in invasionibus, quæ circa res soli fiunt; ut, ex hac causâ, ab omni rapinâ homines abstineant.

to be his own; and that, whoever offends by forcibly seizing his own property, shall forfeit it; and that, whoever forcibly takes the property of another, imagining it to be his own, shall be obliged not only to restore the thing itself, but also to pay the value of it as a penalty. And the emperors have thought proper, that this should obtain, not only as to things moveable and moving, which may be carried away, but also as to invasions or forcible entries, made upon things immoveable, as lands or houses, that mankind may be deterred from committing any species of rapine.

Quibus datur.

§ II. Sanè in hac actione non utique expectatur rem in bonis actoris esse; nam, sivè in bonis sit, sivè non, si tamen ex bonis sit, locum hæc actio habebit. Quare sivè locata, sivè commodata, sivè etiam pignorata, sivè deposita, sit res apud Titium sic, ut intersit ejus, eam rem per vim non auferri, (veluti si in depositâ re culpam quoque promisit,) sivè bonâ fide possideat, sivè usumfructum quis habeat in eâ, vel quid aliud juris, ut intersit ejus non rapi, dicendum est, ei competere hanc actionem, non ut dominium accipiat, sed illud solùm, quod ex bonis ejus, qui rapinam passus est, id est, quod ex substantiâ ejus ablatum esse proponatur. Et generaliter dicendum est, ex quibus causis furti actio competit in re clam factâ, ex iisdem causis omnes hanc habere actionem.

§ 2. *In this action, it is not considered, whether the thing forcibly taken be the property of the complainant or not; for if he have an interest in it, the action is maintainable: and therefore, if a thing be let, lent, pledged, or deposited, so that the possessor becomes interested in the preservation of it, as he may be, if he has made himself answerable for the deposit; for, if he was a* bonâ fide *possessor, or intitled to the usufruct, or has any other right, which gives an interest, he may bring this action, not for the recovery of the absolute property, but of that only, to which his interest extends. And we may in general affirm, that the same causes, which intitle a man to an action of theft in case of private stealing, will also intitle him to the action* vi bonorum raptorum, *when force hath been used.*

TITULUS TERTIUS.

DE LEGE AQUILIA.

D. ix. T. 2. C. iii. T. 35.

Summa. Caput primum.

DAMNI injuriæ actio constituitur per legem Aquiliam; cujus primo capite cautum est, ut si quis alienum hominem, alienamve quadrupedem, quæ pecudum numero sit, injuriâ occiderit, quanti ea res in eo anno plurimi fuerit, tantùm domino dare damnetur.

The action for injurious damage is given by the law Aquilia; *which enacts, in the first chapter, that, if any man injuriously kills the slave, or the four-footed beast of another, which may be reckoned among his cattle, he shall be condemned to pay the owner the greatest price, which the slave or beast might have been sold for, at any time within a year preceding.*

De quadrupede, quæ pecudum numero est.

§ I. Quod autem non præcisè de quadrupede, sed de eâ tantum, quæ pecudum numero est, cavetur, eo pertinet, ut neque de feris bestiis, neque de canibus, cautum esse intelligamus; sed de iis tantum, quæ gregatim propriè pasci dicuntur; quales sunt equi, muli, asini, oves, boves, capræ. De suibus quoque idem placuit. Nam et sues quoque pecudum appellatione continentur; quia et hi gregatim pascuntur. Sic denique et Homerus in Odysseâ ait; (sicùt Ælius Marcianus in suis institutionibus refert.)

Δηυς τοιγε συεσσι παεμμενον· αι δε νεμονται
Παε Κοραικον πετρην, επι τε κρηνη Αρεθουσης.

Hoc est,

Assidet is suibus, quarum grex magnus in agris
Pascitur, ad Coracis saxum, fontemque Arethusam.

§ 1. *As the law does not speak of four-footed beasts in general, but only of cattle, we may collect, that wild beasts and dogs do not come within the intendment, which can be understood to include only those animals, which feed in herds; as horses, mules, asses, sheep, oxen, goats,* &c. *It hath also been determined, that swine are comprised under the term cattle, because they feed in herds; and this* Homer *testifies in the Odyssey, for which he is quoted by* Ælius Marcian *in his institutions.* You will find him taking care of the swine, which feed in herds near the *Corasian* rock, &c. *Odys. b.* 13.

De injuriâ.

§ II. Injuriâ autem occidere intelligitur, qui nullo jure occidit: itaque, qui latronem insidiatorem occidit, non tenetur; utique si aliter periculum effugere non potest.

§ 2. *A man, who kills another without proper authority, is understood to kill him injuriously: but, he is not subject to the law, who kills a robber lying in wait if there was no other way of avoiding the danger threatened.*

De casu, dolo, et culpâ.

§ III. Ac ne is quidem hac lege tenetur, qui casu occidit, si modo culpa ejus nulla inveniatur. Nam alioqui non minus ex dolo, quam ex culpâ, quisque hac lege tenetur.

§ 3. *Nor is he liable under this law, who hath killed another by accident if no fault can be imputed to him. But the law holds a man equally liable for negligence or fraud.*

De jaculatione.

§ IV. Itaque, si quis, dum jaculis ludit vel exercitatur, transeuntem servum tuum trajecerit, distinguitur. Nam, si id à milite in eo campo, ubi solitum est exercitari, admissum est, nulla culpa ejus intelligitur; si alius tale quid admiserit, culpæ reus est. Idem juris est de milite, si in alio loco, quam qui ad exercitandum militibus destinatus est, id admiserit.

§ 4. *But, if a man, by throwing a javelin for his diversion or exercise, happen to kill a slave, who is passing, we must, in this case, make a distinction: for, if the slave be killed by a soldier, while exercising in a place appointed for that purpose, the soldier is guilty of no fault; but, if any other person should accidentally kill a slave, by throwing a javelin, he is guilty; and even, if a soldier should kill a slave accidentally by throwing a javelin in any other place, than that appointed for soldiers to exercise in, he also is guilty of a fault (*i. e. *culpable negligence.)*

De putatione.

§ V. Item si putator, ex arbore ramo dejecto, servum tuum transeuntem occiderit, si propè viam publicam aut vicinalem id factum est, neque proclamavit, ut casus evitari

§ 5. *If a man lopping a tree, chance to kill a slave who is passing, he is an offender if he worked near a public road, or in a way leading to a village, without giving pro-*

posset, culpæ reus est; sed, si proclamavit, nec ille curavit præcavere, extra culpam est putator. Æquè extra culpam esse intelligitur, si seorsùm à viâ fortè, vel in medio fundo cædebat, licèt non proclamavit: quia in eo loco nulli extraneo jus fuerat versandi.

per warning; but, if he made due proclamation, and the other did not take care of himself, the lopper is exempt from fault: and he is equally so, although he did not make proclamation, if he worked apart from the high road, or in the middle of a field; for a stranger has no right of passage through such places.

De curatione relicta.

§ VI. Præterea, si medicus, qui servum tuum secuit, dereliquerit curationem ejus, et ob id mortuus fuerit servus, culpæ reus erit.

§ 6. *Also, if a surgeon having performed an operation on a slave, should neglect or forsake the cure, by reason whereof the slave dies, he is guilty of culpable negligence.*

De imperitiâ medici.

§ VII. Imperitia quoque culpæ annumeratur; veluti si medicus ideò servum tuum occiderit, quia malè eum secuerit, aut perperàm ei medicamentum dederit.

§ 7. *The want of professional skill, is also regarded as culpable: as if a physician occasion the death of a slave by an unskillful incision, or a rash administration of medicine.*

De imperitiâ et infirmitate mulionis, aut equo vecti.

§ VIII. Impetu quoque mularum, quas mulio propter imperitiam retinere non potuit, si servus tuus oppressus fuerit, culpæ reus est mulio. Sed et, si propter infirmitatem eas retinere non potuerit, cum alius firmior eas retinere potuisset, æquè culpæ tenetur. Eadem placuerunt de eo quoque, qui cum equo veheretur, impetum ejus, aut propter infirmitatem, aut propter imperitiam suam, retinere non potuerit.

§ 8. *If a mule-driver, from want of skill, is unable to manage his mules, and a slave is run over by them, the mule-driver is in fault; and, if he want strength to rein them in, when another man is able to do it, he is then equally culpable: and the same may be said of a rider, who, through want either of strength or skill, is not able to manage his horse.*

Quanti damnum æstimetur, et de hæredibus.

§ IX. His autem verbis legis, *quanti id eo in anno plurimi fuerit*, illa sententia exprimitur, ut si quis hominem tuum, qui hodie claudus, aut mancus, aut luscus erit, occiderit, qui in eo anno integer aut pretiosus fuerit, non tanti teneatur, quanti hodie erit, sed quanti in eo anno plurimi fuerit: ratione creditum est pœnalem esse hujus legis actionem; quia non sclùm tanti quisque obligatur, quantum damni dederit, sed aliquando longè pluris. Ideòque constat, hæredem eam actionem non transire, quæ transitura fuisset, si ultra damnum nunquam lis æstimaretur.

§ 9. *The words of the law* Aquilia, let him who kills a slave, or beast of another, forfeit the greatest price, which either could have been sold for in that year, *mean this; if* Titius *accidentally kill a slave, who was then lame, or wanted a limb, or an eye, but had been within the space of a year perfect in all his parts, and valuable, then* Titius *shall be liable, not merely to his value on that day, but to his highest value at any time within a year preceding his death. An action therefore, upon the law* Aquilia, *has always been regarded as penal; for it obliges a man to pay not only the full value of the damage done, but often much more; and of consequence can by no means pass against the heir of the offender: but it might legally have been transferred against the heir, if the condemnation had never exceeded the quantum of the damage.*

Quid æstimatur.

§ X. Illud non ex verbis legis, sed ex interpretatione, placuit, non solùm perempti corporis æstimationem habendam esse secundum ea, quæ diximus, sed, eo amplius, quicquid præterea, perempto eo corpore, damni nobis illatum fuerit; veluti si servum tuum hæredem ab aliquo institutum ante quis occiderit, quam is jussu tuo hæreditatis quoque amissæ rationem esse habendam constat. Item, si ex pari mularum unam, vel ex quadri-

§ 10. *It hath prevailed by construction, though not by the express words of the law, that not only the value of a slave is to be computed, as we have already mentioned; but that an estimation must be made of whatever farther damage is occasioned by his death; as if your slave should be killed just as he was instituted heir, and before actual entry upon the heirship at your command, for in this case, the loss of the inheritance must be brought into the computation.*

gis equorum unum, quis occiderit, vel ex comœdis unus servus occisus fuerit, non solum occisi fit æstimatio, sed eo amplius id quoque computatur, quanti depretiati sunt, qui supersunt.

Also if a horse, or mule be killed, by which a pair, or set, is broken, or if a slave be slain, who made one of a company of comedians, an estimation must be made, not merely of the value of that slave or animal, but of the diminished value of those, which remain.

De concursu hujus actionis et capitalis.

§ XI. Liberum autem est ei, cujus servus occisus fuerit, et ex judicio privato legis Aquiliæ damnum persequi, et capitalis criminis eum reum facere.

11. *The master of a slave, who is killed, may bring a civil action for damages founded upon the law* Aquilia, *and at the same time prosecute the offender for a capital crime.*

Caput secundum.

§ XII. Caput secundum legis Aquilæ in usu non est.

§ 12. *The second chapter of the law* Aquilia *is not in use.*

Caput tertium. Quod damnum vindicatur.

§ XIII. Capite tertio de omni cætero damno cavetur; itaque, si quis servum, vel eam quadrupedem, quæ in pecudum numero est, vulneraverit, sivè eam quadrupedem, quæ in pecudum numero non est, veluti canem, aut feram bestiam, vulneraverit aut occiderit, hoc capite actio constituitur. In cæteris quoque omnibus animalibus, item in omnibus rebus quæ animâ carent, damnum per injuriam datum hac parte vindicatur. Si quid enim ustum, aut ruptum, aut fractum fuerit, actio ex hoc capite constituitur; quanquam poterat sola rupti appellatio in omnes istas causas sufficere: ruptum enim intelligitur, quod quoquo modo corruptum est; undè non solùm fracta, aut usta, sed etiam scissa, et colli-

§ 13. *By the third chapter of this law, a remedy is given for every other kind of damage; therefore, if a man wound a slave, or four-footed animal, whether ranked among cattle or not, as a dog or wild beast, an action will lie against him. Reparation may also be obtained, under this chapter, for all damage injuriously done to animals in general, or to things inanimate; and for things burned, spoiled, or broken. The term* ruptum *would alone be sufficient in any of these cases; for in whatever manner a thing be damaged, or spoiled, it is understood to be* ruptum; *so that, whenever a thing is broken, burned, torn, bruised, spilled, or in any manner made worse, it may be said to be* ruptum. *It hath also been determined, that,*

sa, et quoquo modo perempta atque deteriora facta, hoc verbo continentur. Denique responsum est, si quis in alienum vinum aut oleum id miscuerit, quo naturalis bonitas vini aut olei corrumperetur, ex hac parte legis Aquiliæ eum teneri.

to intermix any thing with the wine or oil of another, so as to corrupt or impair its natural goodness, renders the offender liable under this chapter of the law Aquilia.

De dolo et culpâ.

§ XIV. Illud palàm est, sicut ex primo capite demum quisque tenetur, si dolo aut culpâ ejus homo aut quadrupes occisus occisave fuerit, ita ex hoc capite, de dolo aut culpâ, et de cætero damno quemque teneri: ex hoc tamen capite, non quanti in eo anno, sed quanti in diebus triginta proximis res fuerit, obligatur is, qui damnum dederit.

§ 14. *It is evident, that the first chapter of the law subjects every man to an action, who through design or negligence kills the slave or beast of another, and that the third part gives a remedy for any other damage, so occasioned. But by this third chapter the offender is not liable to the highest price, which the thing damaged might have sold for at any time within the year, but only at any time within thirty days previous to the damage.*

Quanti damnum æstimetur.

§ XV. Ac nec *plurimi* quidem verbum adjicitur. Sed Sabino rectè placuit, perindè habendam æstimationem, ac si etiam hac parte *plurimi* verbum adjectum fuisset; nam plebem Romanam, quæ, Aquilio tribuno rogante, hanc legem tulit, contentam fuisse, quod primâ parte eo verbo usa esset.

§ 15. *There is no expression of the* highest *value. But, in the opinion of* Sabinus, *the valuation ought to be made, as if the word highest had been used: for, when* Aquilius, *the tribune, proposed this law, the commonalty of* Rome *thought it sufficient to insert the word* highest *in the first chapter.*

De actione directâ, utili, et in factum.

§ XVI. Cæterum placuit, ita demum directam ex hac lege actionem esse, si quis præcipuè corpore suo damnum dederit: ideòque in eum, qui alio modo damnum dederit,

§ 16. *It has been determined, that, if a man with his own hand or body, injures another, a direct action will lie under this law. But when damage is done by any other means,*

utiles actiones dari solent; veluti si quis hominem alienum, aut pecus, ita incluserit, ut fame necaretur; aut jumentum ita vehementer egerit, ut rumperetur; aut pecus in tantum exagitaverit, ut præcipitaretur: aut si quis alieno servo persuaserit, ut in arborem ascenderet, vel in puteum descenderet, et is ascendendo, vel descendendo, aut aliquâ parte corporis læsus fuerit, utilis actio in eum datur: sed, si qus alienum servum aut de ponte, aut de ripâ, in flumen dejecerit, et is suffocatus fuerit, eo quod projecit, corpore suo damnum dedisse non difficulter intelligi potest; ideòqe ipsâ lege Aquilia tenetur. Sed, si non corpore damnum fuerit datum, neque corpus læsum fuerit, sed alio modo alicui damnum contigerit, cum non sufficiat neque directa, neque utilis legis Aquiliæ actio, placuit, eum, qui obnoxius fuerit, in factum actione teneri; veluti si quis, misericordiâ ductus, alienum servum compeditum solverit, ut fugeret.

as by imprisoning a slave, or impounding the cattle of another, until they die with hunger; by driving a beast of burden so vehemently as to spoil him; by chasing a herd of cattle until they leap down a precipice; or by persuading a slave to climb a tree, or to go down into a well, by which he is killed or maimed; then the remedy by action called utilis, *is given. If* Titius *thrust the slave of another into the water from the top of a bridge or bank, and the slave is thereby drowned, it is plain, that* Titius *occasioned this damage with his own hands, and he is therefore subject under the* Aquilian *law, to a direct action. But if the damage received was not done by the hand or body of another, and is not corporal, so that neither a direct nor beneficial action can be brought by virtue of the* Aquilian *law, then an action upon the case, or fact, will lie against the offender; as if man through compassion should unchain the slave of another, and so promote his escape.*

TITULUS QUARTUS.

DE INJURIIS.

D. xlvii. T. 10. C. ix. T. 35. et 36.

Verbum injuria quot modis accipitur.

GENERALITER injuria dicitur omne, quod non jure fit; specialiter, alias contumelia, quæ à contemnendo dicta est, quam Græci ὕβριν appellant; alias culpa, quam Græci ἀδίκημα dicunt, sicut in lege Aquilia damnum injuria datum accipitur; alias iniquitas et injustitia, quam Græci ἀνομίαν καὶ ἀδικίαν vocant: cum enim prætor vel judex non jure contra quem pronunciat, injuriam accepisse dicitur.

Injuria *in a general sense denotes every unjust act; but, when specially used, it is the same with* contumelia, *derived from* contemno, *in* greek ὕβρις: *sometimes it signifies a fault, called by the* greeks ἀδίκημα *in which acceptation it is used in the law* Aquilia, *when damage injuriously occasioned, is spoken of: at other times it signifies iniquity or injustice, which the* greeks *call* ἀνομίαν *and* ἀδικίαν: *therefore, when the prætor or judge decides unjustly against any person, such person is said to be injured.*

Quibus modis injuria fit.

§ I. Injuria autem committitur, non solùm cum quis pugno pulsatus, aut fustibus cæsus, vel etiam verberatus erit; sed et si cui convitium factum fuerit; sivè cujus bona, quasi debitoris, qui nihil deberet, possessa fuerint ab eo, qui intelligebat, nihil eum sibi debere; vel si quis ad infamiam alicujus libellum aut carmen (aut historiam) scripserit, composuerit, ediderit, dolove malo fecerit, quo quid eorum fieret; sivè quis matrem familias, aut prætextatum prætextatamve, adsectatus fuerit: sivè cujus pudicitia attentata esse dicetur: et denique, aliis plurimis modis admitti injuriam, manifestum est.

§ 1. *An injury may be done not only by beating and wounding, but also by slanderous language, by seizing the goods of a man, as if he were a debtor, when the person, who seized them, well knew, that nothing was due to him; by writing a defamatory libel, poem, or history; or by maliciously causing another so to do; also by continually soliciting the chastity of a boy, girl, or woman of reputation; and by various other means, too numerous to be specified.*

Qui et per quos injuriam patiuntur. De parente et liberis, viro et uxore, socero et nuru.

§ II. Patitur autem quis injuriam non solùm per semetipsum, sed etiam per liberos suos, quos in potestate habet ; item per uxorem suam ; id enim magis prævaluit. Itaque, si filiæ alicujus, quæ Titio nupta est, injuriam feceris, non solùm filiæ nomine tecum injuriarum agi potest, sed etiam patris quoque et mariti nomine. Contra autem, si viro injuria facta sit, uxor injuriarum agere non potest : defendi enim uxores à viris, non viros ab uxoribus, æquum est. Sed et socer nurus nomine, cujus vir in ejus potestate est, injuriarum agere potest.

§ 2. *It is understood that a man may receive an injury, not only in his own person, but in that of children under his power, and also in the person of his wife ; and therefore, if an injury be done to* Seius's *daughter married to* Titius, *an action may be brought not only in the name of the daughter, but in the name of her father or her husband ; but, if the husband receive an injury, the wife is not allowed to institute a suit in his defence ; for it is a maxim, that wives may be defended by their husbands, but not husbands by their wives. And a father-in-law may bring an action for damages in the name of his son's wife, if her husband be under the power of his father.*

De servo.

§ III. Servis autem ipsis quidem nulla injuria fieri intelligitur, sed domino per eos fieri videtur : non tamen iisdem modis, quibus etiam per liberos et uxores ; sed ita, cum quid atrocius commissum fuerit, et quod apertè ad contumeliam domini respicit ; veluti si quis alienum servum atrociter verberaverit ; et in hunc casum actio proponitur. At, si quis servo convitium fecerit, vel pugno eum percusserit, nulla in eum actio domino competit.

§ 3. *An injury is never considered as done to a slave, but through him to the master ; not however in the same manner as through a wife or child ; as when some atrocious injury is done to the slave, manifestly in despite of the master ; as if any one should cruelly beat the slave of another ; in which case an action would lie ; but, if a man should only give ill language to a slave, or strike him with his fist, the master is entitled to no action against him.*

De servo communi.

§ IV. Si communi servo injuria facta sit, æquum est, non pro eâ parte, qua dominus quisque est, æstimationem injuriæ fieri, sed ex dominorum personâ, quia ipsis fit injuria.

§ 4. *If an injury be done to the common slave of many masters, it is to be estimated, not according to their respective rights in the slave, but according to the quality of each master; for the injury is done to them.*

De servo fructuario.

§ V. Quod si ususfructus in servo Titii est, proprietas Mævii, magis Mævio injuria fieri intelligitur.

§ 5. *If* Titius *has the usufruct of a slave, and* Mævius *the property, then any injury done to the slave, is understood to be done to* Mævius.

De eo, qui bonâ fide servit.

§ VI. Sed, si libero homini, qui tibi bonâ fide servit, injuria facta sit, nulla tibi actio dabitur, sed suo nomine is expiriri poterit, nisi in contumeliam tuam pulsatus sit; tunc enim competit et tibi injuriarum actio. Idem ergò est et in servo alieno bonâ fide tibi servienti; ut toties admittatur injuriarum actio, quoties in tuam contumeliam injuria ei facta est.

§ 6. *But, if an injury be done to a free person in the service of another, the servant must bring suit in his own name, unless the person who beat him, did it principally for the sake of affronting his master; in which case the master may also bring an action of injury. And so if your servant be the slave of another; for as often as he receives an injury, which was intended to insult you, you may bring an action of injury.*

Pœna injuriarum ex l. xii. tabb. et ex jure prætorio.

§ VII. Pœna autem injuriarum propter membrum quidem ruptum talio erat; propter os verò fractum nummariæ pœnæ erant constitutæ, quasi in magnâ veterum paupertate. Sed postea prætores permittebant ipsis, qui injuriam passi sunt, eam æstimare; ut judex vel tanti reum condemnet, quanti injuriam passus æstimaverit, vel mino-

§ 7. *The punishment of an injury, by the* 12 *tables, was a return of the like injury, if a limb was broken; but, if a blow only was given, or a single bone broken, then the punishment was pecuniary, the ancients living in great poverty. The prætors afterwards permitted the parties injured to fix their damages at a certain sum, which might serve as*

ris, prout ei visum fuerit. Sed pœna quidem injuriæ, quæ ex lege xii. tabularum introducta est, in desuetudinem abiit: quam autem prætores introduxerunt, (quæ etiam honoraria appellatur,) in judiciis frequentatur. Nam, secundùm gradum dignitatis vitæque honestatem, crescit aut minuitur æstimatio injuriæ: qui gradus condemnationis et in servili personâ non immeritò servatur, ut aliud in servo actore, aliud in medii actûs homine, aliud in vilissimo vel compedito, jus æstimationis constituatur.

a guide to the judge, but not preclude him from lessening the estimate at his discretion. The species of pecuniary punishment, which was introduced by the law of the 12 tables, fell gradually into disuse, and that only which the prætors introduced, termed honorary, is now resorted to: for the estimate of an injury is increased or diminished according to the degree and quality of the person injured; a gradation not improperly observed even as to slaves; so that one estimate may be adopted in the case of a steward or agent to his master, and a lower one in the case of an inferior slave.

De lege Corneliâ.

§ VIII. Sed et lex Cornelia de injuriis loquitur, et injuriarum actionem introduxit, quæ competit ob eam rem, quod se pulsatum quis, verberatumve, vel domum suam vi introitam esse, dicat. Domum autem accipimus, sivè in propriâ domo quis habitet, sivè in conductâ, sivè gratis, sivè hospitio receptus sit.

§ 8. *The law* Cornelia *speaks also of injuries, and hath introduced an action, which lies, when a man alledges, that he hath been struck or beaten, or that another hath entered forcibly into his house; and whether he owns, or hires, or borrows, or lives in it as a guest, it is regarded as his house.*

De æstimatione atrocis injuriæ.

§ IX. Atrox injuria æstimatur vel ex facto, veluti si quis ab alio vulneratus sit, vel fustibus cæsus; vel ex loco, veluti si cui in theatro, vel in foro, vel in conspectu prætoris, injuria facta sit; vel ex personâ, veluti si magistratus injuriam passus fuerit, vel si senatori ab humili personâ injuria facta sit, aut parenti patronove fiat à liberis vel

§ 9. *An injury is esteemed atrocious, from the nature of the fact, as when a man is wounded by another, or beaten with a club—from the place, as when an injury is done in a public theatre, in an open market, or in the presence of the prætor—and sometimes from the rank of the person, as when a magistrate, or a senator, receives an injury from*

libertis. Aliter enim senatoris et parentis patronique, aliter extranei et humilis personæ, injuria æstimatur. Nonnunquam et locus vulneris atrocem injuriam facit, veluti si in oculo quis percussus fuerit. Parvi autem refert, utrum patri-familias, an filio-familias, talis injuria facta sit: nam et hæc atrox injuria æstimabitur.

one of mean condition, a parent from his child, or a patron from his freedman; for these cases demand a heavier punishment, than where an injury is done to a stranger, or a person of low degree. Also the part injured, may constitute an injury atrocious; as if a man should be wounded in his eye; but it is of little consequence whether such an injury be done to the father of a family, or to the son of a family; for such an injury will be considered as atrocious.

De judicio civili et criminali.

§ X. In summâ sciendum est, de omni injuriâ eum, qui passus est, posse vel criminaliter agere, vel civiliter: et, si quidem civiliter agatur, æstimatione factâ, secundùm quod dictum est, pœna reo imponitur; sin autem criminaliter, officio judicis extraordinaria pœna reo irrogatur. Hoc videlicèt observando, quod Zenoniana constitutio introduxit, ut viri illustres, quique super eos sunt, et per procuratores possint actionem injuriarum criminaliter vel persequi vel suspicere, secundùm ejus tenorem, qui ex ipsâ manifestius apparet.

§ 10. *In fine, it must be observed concerning every injury, that the party injured may sue either criminally or civilly. If civilly, the damage must be estimated, and the penalty awarded as we have before noticed: but, if he sue criminally, it is the duty of the judge to inflict an extraordinary punishment upon the offender; observing the constitution of* Zeno, *which permits* illustrious *persons, and those who enjoy a superior title, either to pursue or defend criminally any action of injury by their proctors; but the tenor of this law will more fully apppear by a perusal of the ordinance itself.*

Qui tenentur injuriarum.

§ XI. Non solùm autem is injuriarum tenetur, qui fecit injuriam, id est, qui percussit; verùm ille quoque tenetur, qui dolo fecit injuriam, vel qui procuravit, ut cui mala pugno percuteretur.

§ 11. *An action of injury lies not only against him, who hath done an injury, by giving a blow, &c. but also against him, who by craft, or by persuasion hath caused the injury to be done.*

Quomodo tollitur hæc actio.

§ XII. Hæc actio dissimulatione aboletur; et ideò, si quis injuriam dereliquerit, hoc est, statim passus ad animum suum non revocaverit, postea ex pœnitentiâ remissam injuriam non poterit recolere.

§ 12. All right to an action of injury may be lost by suppression; therefore, if a man takes no notice of an injury at the time, when he receives it, he cannot afterwards repent of his forbearance and bring suit.

TITULUS QUINTUS.

DE OBLIGATIONIBUS, QUÆ QUASI EX DELICTO NASCUNTUR.

D. xlvii, T. 5. C. ix, T. 3.

Si judex litem suam fecerit.

SI judex litem suam fecerit, non propriè ex maleficio obligatus videtur: sed quia neque ex maleficio, neque ex contractu obligatus est, et utique peccasse aliquid intelligitur, licèt per imprudentiam, ideò videtur quasi ex maleficio teneri; et, in quantum de eâ re æquum religioni judicantis videbitur, pœnam sustinebit.

If a judge make a suit his own, by giving an unjust determination, an action of mal-feasance will not properly lie against him: but, granting he is not subject to an action of mal-feasance, or of contract, yet, as he hath certainly committed a fault, although not by design, but through imprudence and want of skill, he may be sued by an action of quasi-*mal-feasance; and must suffer such penalty, as seems equitable to the conscience of a superior judge.*

De dejectis vel effusis, et positis aut suspensis.

§ I. Item is, cujus ex cœnaculo, vel proprio ipsius, vel conducto, vel in quo gratis habitat, dejectum effusumve aliquid est, ita ut alicui noceret, quasi ex maleficio obligatus

§ 1. *The occupier of a chamber, from whence any thing hath been thrown or spilt, whereby damage is done, is liable to an action of* quasi-*mal-feasance; and it is not material,*

intelligitur. Ideò autem non propriè ex maleficio obligatus intelligitur, quia plerùmque ob alterius culpam tenetur, aut servi aut liberi. Cui similis est is, qui eà parte, quà vulgo iter fieri solet, id positum aut suspensum habet, quod potest, si ceciderit, alicui nocere; quo casu pœna decem aureorum constituta est. De eo verò, quod dejectum effusumve est, dupli, quantum damni datum sit, constituta est actio. Ob hominem verò liberum occisum, quinquaginta aureorum pœna constituitur. Si verò vivat, nocitumque ei esse dicatur, quantum ob eam rem æquum judici videtur, actio datur. Judex enim computare debet mercedes medicis præstitas, cæteraque impendia, quæ in curatione facta sunt; præterea operas, quibus caruit aut cariturus est, ob id, quod inutilis est factus.

whether the chamber be his property; whether he rents it; or inhabits it gratis: *and the reason, why such occupier is not suable for a direct mal-feasance, is, because he is generally sued for the fault of another. Any man is also subject to the same action, who hath hung or placed any thing in a public road, so as to endanger passengers by the fall of it; in which case, a penalty of ten* aurei *is appointed: but, when any thing hath been thrown or spilt, the action is always for double the actual damage. If a freeman be killed by accident, the penalty is fifty* aurei; *but, if he only receive some hurt, the quantum of the damage is at the discretion of the judge, who ought to take into account the fees of the physician and all other expences attendant upon the cure, over and above the time, which the patient hath lost in his illness, or may lose by being unable to pursue his business.*

De filio-familias, seorsum habitante à patre.

§ II. Si filius-familias seorsum à patre habitaverit, et quid ex cœnaculo ejus dejectum effusumve fuerit, sivè quid positum suspensumve habuerit, cujus casus periculosus est, Juliano placuit, in patrem nullam esse actionem, sed cum ipso filio agendum esse. Quod et in filio-familias judice observandum est, qui litem suam fecerit.

§ 2. *If the son of a family live separate from his father, and any thing is either thrown, or spilt, from his apartment, or so hung, or placed, that the fall of it may be dangerous, it is the opinion of* Julian, *that no action will lie against the father, and that the son only can be sued. The same rule of law is also to be observed, in regard to the son of a family, who hath given as a judge, an unjust decision.*

De damno aut furto, quod in navi, aut cauponâ, aut stabulo, factum est.

§ III. Item exercitor navis, aut cauponæ, aut stabuli, de damno aut furto, quod in navi, aut cauponâ, aut stabulo, factum erit, quasi ex maléficio teneri videtur; si modo ipsius nullum est maleficium, sed alicujus eorum, quorum opera navem, aut cauponam, aut stabulum, exercet. Cum enim neque ex maleficio, neque ex contractu, sit adversus eum constituta hic actio, et aliquatenus culpæ reus est, quod opera malorum hominum uteretur, ideò quasi ex maleficio teneri videtur. In his autem casibus in factum actio competit; quæ hæredi quidem datur, adversus hæredem autem non competit.

§ 3. *The master of a ship, tavern, or inn, is liable to be sued for a* quasi-*mal-feasance, on account of every damage, or theft, done or committed in any of these places, by himself or his servants: for although no action, either of direct mal-feasance, or of contract, can be brought against the master, yet, as he has, in some measure, been guilty of a fault in employing dishonest persons as his servants, he is therefore subject to a suit for a* quasi-*mal-feasance. But, in all these cases, the action given is an action upon the fact, which may be brought in favour of an heir, but not against him.*

TITULUS SEXTUS.

DE ACTIONIBUS.

D. xliv. T. 7. C. iv. T. 10.

Continuatio, et Definitio.

SUPEREST, ut de actionibus loquamur. Actio nihil aliud est, quam jus persequendi in judicio, quod sibi debetur.

It now remains, that we treat of actions. An action is nothing more, than the right of suing in a court of law for our just demands.

Divisio prima.

§ I. Omnium autem actionum, quibus inter aliquos apud judices arbitrosve de quâcunque re quæri-

§ 1. *All actions whatever be the subject matter of them whether determinable before judges or referrees may*

tur, summa divisio in duo genera deducitur: aut enim in rem sunt, aut in personam: namque agit unusquisque aut cum eo, qui ei obligatus est, vel ex contractu, vel ex maleficio; quo casu proditæ sunt actiones in personam, per quas intendit, adversarium ei dare aut facere oportere, et aliis quibusdam modis: aut cum eo agit, qui nullo jure ei obligatus est, movet tamen alicui de aliquâ re controversiam; quo casu proditæ actiones in rem sunt: veluti si rem corporalem possideat quis, quam Titius suam esse affirmet, possessor autem, dominum ejus se esse, dicat; nam, si Titius suam esse intendat, in rem actio est.

be divided into real and personal; for the plaintiff must sue the defendant, either because the defendant is obligated to him by contract, or hath been guilty of some mal-feasance; and, in this case, the action must be personal, in which the plaintiff alledges, that his adversary is bound to give, or to do something for his benefit; or some other matter, as the occasion requires: or otherwise, the plaintiff must sue the defendant, on account of some corporeal thing, when there is no obligation; in which case the action must be real: as for example, if a man possess land, which Titius *affirms to be his property, the other denying it,* Titius *must bring a real action for the recovery.*

De actione confessoriâ, et negatoriâ.

§ II. Æquè, si agat quis, jus sibi esse fundo fortè, vel ædibus utendi fruendi, vel per fundum vicini eundi agendi, vel ex fundo vicini aquam ducendi, in rem actio est. Ejusdem generis est actio de jure prædiorum urbanorum; veluti, si quis agat, jus sibi esse altius ædes suas tollendi, prospiciendive, vel projiciendi aliquid, vel immittendi tignum in vicini ædes. Contra quoque de usufructu, et de servitutibus prædiorum rusticorum, item prædiorum urbanorum, invicem quoque proditæ sunt actiones; ut si quis intendat, jus non esse adversario utendi fruendi, eundi agendi, aquamve ducendi; item altius tollendi, prospiciendive, vel projici-

§ 2. *Also, if any man sue, alledging, that he has a right to the usufruct of a field, or house, or a right of driving his cattle, or of drawing water in the land of his neighbour, this is a real action. And an action relating to the rights of houses or city estates, which rights are called services, is also of the same kind; as when a man commences a suit, and alledges, that he has a right of prospect, a right to raise his house, a right of making a part of it project, or of laying the beams of his building upon his neighbour's walls. There are also actions different from these, which relate to usufructs, and the rights of country and city estates; as when the complainant alledges, that his*

endi, immittendive : istæ quoque actiones in rem sunt, sed negativæ ; quod genus actionis in controversiis rerum corporalium proditum non est ; nam in his is agit, qui non possidet ; ei verò, qui possidet, non est actio prodita, per quam neget rem actoris esse. Sanè non uno casu, qui possidet, nihilominus is actoris partes obtinet ; sicut in latioribus digestorum libris opportunius apparebit.

adversary is not *intitled to the usufruct of a particular ground, or to the right of passage*, &c. &c. *These actions are also real, but are negative in their nature, and cannot therefore be used in controversies respecting things corporeal, where the agent, or plaintiff, is the person out of possession : for a possessor can bring no action : there are however, many cases, in which a possessor may be obliged to act the part of a plaintiff ; but we refer the reader to the books of the digests.*

De actionibus prætoriis realibus.

§ III. Sed istæ quidem actiones, quarum mentionem habuimus, et si quæ sunt similes, ex legitimis et civilibus causis descendunt. Aliæ autem sunt, quas prætor ex suâ jurisdictione comparatas habet, tam in rem, quam in personam ; quas et ipsas necessarium est exemplis ostendere : ut ecce, plerùmque ita permittit prætor in rem agere, ut vel actor dicat, se quasi usucepisse, quod non usuceperit, vel ex diverso possessor dicat, adversarium suum non usucepisse, quod usuceperit.

§ 3. *The actions just mentioned and those of a similar nature, are derived from the civil law ; but the prætor, by virtue of his jurisdiction, hath introduced other actions, both real and personal, of which it will be necessary to give some examples : for he often permits a real action to be brought, either by allowing the demandant to alledge, that he hath acquired by prescription, what he hath not so acquired ; or, on the contrary, by permitting a former possessor to alledge, that his adversary hath not acquired by prescription, what, in reality, he hath so acquired.*

De Publicianâ.

§ IV. Namque, si cui ex justâ causâ res aliqua tradita fuerit, (veluti ex causâ emptionis, aut donationis, aut dotis, aut legatorum,) et necdum ejus rei dominus effectus est, si is ejus rei possessionem casu

§ 4. *If any thing should be delivered to or deposited with a man in trust upon some just account, as by reason of a purchase, a gift, a marriage, or a bequest, and the trustee should lose the possession, before he*

amiserit, nullam habet in rem directam actionem ad eam persequendam: quippe ita proditæ sunt jure civili actiones, ut quis dominium suum vindicet. Sed, quia sanè durum erat, eo casu deficere actionem, inventa est à prætore actio, in quâ dicit is, qui possessionem amisit, eam rem se usucepisse, quam usu non cepit, et ita vindicat suam esse: quæ actio Publiciana appellatur, quoniam primum à Publicio prætore in edicto proposita est.

hath gained a property in the thing possessed, he could have no direct action for the recovery of it; inasmuch as real actions are given by law for the re-vindication of those things only, in which a man hath a vested property or dominion. But, it being hard, that an action should be wanting in such a case, the prætor hath supplied one, in which the person, who hath lost his possession, is allowed to prescribe to the thing in question, although he did not obtain it by prescription, and he may thus recover. This action is called actio Publiciana, *because it was first instituted by the edict of* Publicius *the prætor.*

De rescissoriâ.

§ V. Rursus ex diverso, si quis, cum reipublicæ causâ abesset, vel in hostium potestate esset, rem ejus, qui in civitate esset, usucepérit, permittitur domino, si possessor reipublicæ causâ abesse desierit, tunc intra annum rescissâ usucapione eam rem petere, id est, ita petere, ut dicat, possessorum usu non cepisse, et ob id suam rem esse. Quod genus actionis quibusdam et aliis simili æquitate motus prætor accommodat; sicut ex latiore digestorum seu pandectarum volumine intelligere licet.

§ 5. *On the contrary, if any man, while abroad in the service of his country, or a prisoner in the hands of the enemy, should gain a prescriptive title to a thing, which belongs to another person resident at home, then the former proprietor is permitted within a year after the return of the possessor from public service, to bring an action against him, the prescriptive title being rescinded; and may alledge, that the possessor hath not effectually prescribed, so that the thing in litigation is his own. Under the same motive of equity the prætor hath adapted this species of action to certain other persons, as we may learn more at large from the digests.*

De Paulianâ.

§ VI. Item, si quis in fraudem creditorum rem suam alicui tradiderit, bonis ejus à creditoribus possessis ex sententiâ præsidis, permittitur ipsis creditoribus, rescissâ traditione, eam rem petere; id est, dicere eam rem traditam non esse, et ob id in bonis debitoris mansisse.

§ 6. *If a debtor deliver any thing to some person in order to defraud his creditors, they are permitted, notwithstanding the delivery, to bring an action for the thing, if the possession hath been previously adjudged to them by an order of court: that is, they are allowed to plead, that the thing was not delivered, and of course, that it continues to be a part of their debtor's goods.*

De Serviânâ et quasi-Serviânâ, seu hypothecariâ.

§ VII. Item Serviana, et quasi Serviana, (quæ ètiam hypothecaria vocatur,) ex ipsius prætoris jurisdictione substantiam capiunt. Serviana autem experitur quis de rebus coloni, quæ pignoris jure pro mercedibus fundi ei tenentur. Quasi Serviana autem est, qua creditores pignora hypothecasve persequuntur. Inter pignus autem et hypothecam, (quantum ad actionem hypothecariam attinet,) nihil interest; nam de quâ re inter creditorem et debitorem convenerit, ut sit pro debito obligata, utraque hac appellatione continetur; sed in aliis differentia est: nam pignoris appellatione eam propriè rem contineri dicimus, quæ simul etiam traditur creditori, maximè si mobilis sit: at eam, quæ sine traditione nudâ conventione tenetur, propriè hypothecæ appellatione contineri dicimus.

§ 7. *Also the action* Serviana, *and the action* quasi-Serviana, *(which is also called hypothecary,) take their rise from the prætor's jurisdiction. By the action* Serviana, *a suit may be commenced for the property of a farmer, bound for rent. The action* quasi-Serviana *is that, by which a* creditor *may sue for a thing pledged or hypothecated to him; and, in regard to this action, there is no difference between a pledge and an hypotheque; though in other respects they differ; for, by the term pledge, is meant that, which hath actually been delivered to a creditor, especially if the thing was a moveable; hypothecation means the making any thing liable to a creditor by a nude agreement only, without delivery.*

De actionibus prætoriis personalibus.

§ VIII. In personam quoque actiones ex suâ jurisdictione propositas habet prætor, veluti de pecuniâ constitutâ; cui similis videbatur receptitia. Sed ex nostrâ constitutione, (cum, et si quid plenius habebat, hoc in actionem pecuniæ constitutæ transfusum est,) et ea quasi supervacua jussa est cum suâ auctoritate à nostris legibus, recedere. Item prætor proposuit actionem de peculio servorum, filiorumque familiarum; et eam, ex quâ quæritur, an actor juraverit; et alias complures.

§ 8. *Personal actions have also been introduced by the prætors, in consequence of their authority; as the action* de pecuniâ constitutâ; *which much resembles that called* receptitia, *now taken away by our constitution, as unnecessary; and whatever advantageous matter it contained, we have comprized in the action* de pecuniâ constitutâ. *The prætors have likewise introduced the action concerning the* peculium *of slaves, and the sons of families; and also the action wherein the question is, whether the plaintiff hath made oath of his debt; and many others.*

De constitutâ pecuniâ.

§ IX. De constitutâ autem pecuniâ cum omnibus agitur, quicunque vel pro se, vel pro alio, soluturos se constituerint, nullâ scilicet stipulatione interposita: nam alioqui, si stipulanti promiserint, jure civili tenentur.

§ 9. *A suit may be brought* de pecuniâ constitutâ, *against any person who hath engaged to pay money, either for himself or another, without stipulation; but, when there is a stipulation, the promise may be inforced by the civil law.*

De peculio.

§ X. Actiones autem de peculio ideò adversus patrem dominumve comparavit prætor, quia licèt ex contractu filiorum servorumve ipso jure non teneantur; æquum tamen est, peculio tenus, (quod veluti patrimonium est filiorum filiarumque, item servorum,) condemnari eos.

§ 10. *The prætor hath also given actions* de peculio *against fathers and masters, who although they are not legally bound by the contracts of their children and slaves, ought in equity to be bound to the extent of a* peculium, *which is, as it were, the patrimony, and separate estate of a son, a daughter, or a slave.*

De actione in factum ex jurejurando.

§ XI. Item, si quis postulante adversario juraverit, deberi sibi pecuniam, quam peteret, neque ei solvatur, justissimè accommodat ei talem actionem, per quam non illud quæritur, an ei pecunia debeatur, sed an juraverit.

§ 11. *Also if any man, called upon by the adverse party, make oath, that the debt, which he sues for, is due and unpaid, the prætor most justly indulges him with an action upon the fact; in which no inquiry is made, whether the debt be due, but whether the oath hath been taken.*

De actionibus pœnalibus.

§ XII. Pœnales quoque actiones prætor penè multas ex sua jurisdictione introduxit; veluti adversus eum, qui quid ex albo ejus corrupisset; et in eum, qui patronum vel parentem in jus vocasset, cum id non impetrasset; item adversus eum, qui vi exemerit eum, qui in jus vocaretur, cujusve dolo alius exemerit; et alias innumerabiles.

§ 12. *The prætors have also introduced many penal actions, by virtue of their authority. Thus, they have provided an action against him, who hath wilfully damaged or erased an edict; against an emancipated son, or a freed-man, who hath commenced suit against his parent or patron, without previous permission from the proper magistrate; also against any person, who by force or fraud hath hindered another from appearing to the process of a court of justice; and many others.*

De præjudicialibus actionibus.

§ XIII. Præjudiciales actiones in rem esse videntur; quales sunt, per quas quæritur, an aliquis liber, an libertus sit, vel servus, vel de partu agnoscendo. Ex quibus ferè una illa legitimam causam habet, per quam quæritur, an aliquis liber sit: cæteræ ex ipsius prætoris jurisdictione substantiam capiunt.

§ 13. *Prejudicial actions are also real; such are those, by which it is inquired, whether a man is born free, or made free; whether he be a slave, or a bastard. But of these, that only arises from the civil law, by which it is inquired, whether a man be free born: the rest originate from the prætor's jurisdiction.*

An res sua condici possit.

§ XIV. Sic itaque discretis actionibus, certum est, non posse actorem suam rem ita ab aliquo petere, *si paret, eum dare oportere:* nec enim, quod actoris est, id ei dari oportet; scilicet, quia dari cuiquam id intelligitur, quod ita datur, ut ejus fiat: nec res, quæ jam actoris est, magis ejus fieri potest. Planè odio furum, quo magis pluribus actionibus teneantur, effectum est, ut, extra pœnam dupli aut quadrupli, rei recipiendæ nomine, fures etiam hac actione teneantur, *si appareat, eos dare oportere:* quamvis sit adversus eos etiam hæc in rem actio, per quam, rem suam quis esse petit.

§ 14. *Actions being thus either real or personal, it is certain, that a man cannot sue for his own property by a condiction, or a personal action in the following form, viz.* If it appear, that the defendant ought to GIVE it me: *for the act of* giving *implies the conferring of property, and that which is already the property of the plaintiff, can not by being given to him, become more his own, than it is already. But, in order to shew a detestation for thieves and robbers, and to accumulate the actions to which they are liable, it hath been determined, that, besides the double and quadruple penalty, they may be pursued by a condiction for the thing taken, in the form before recited,* if it appear, that they ought to GIVE it. *And this, although the party injured may also bring a real action against them, by which he may demand the thing taken, as his own.*

De nominibus actionum.

§ XV. Appellamus autem in rem quidem actiones, vindicationes; in personam verò actiones, quibus dare aut facere oportere intenditur, condictiones; condicere enim est denuntiare, priscâ linguâ: nunc verò abusivè dicimus, condictionem actionem in personam esse, quâ actor intendit dari sibi oportere; nulla enim hoc tempore eo nomine denuntiatio fit.

§ 15. *Real actions are called vindications; and personal actions, in which it is intended, that something ought to be done or given, are called condictions; for* condicere, *in old language was the same with* denuntiare *to denounce: but condiction is now improperly used for a personal action, by which the plaintiff contends, that something ought to be given to him; for denunciations are not in use.*

Divisio secunda.

§ XVI. Sequens illa divisio est, quod quædam actiones rei persequendæ gratiâ comparatæ sunt, quædam pœnæ persequendæ, quædam mistæ sunt.

§ 16. *Actions are also farther divided into those, which are given to recover the specific thing in dispute; those, which are given for the penalty only: and mixed actions.*

De actionibus rei persecutoriis.

§ XVII. Rei persequendæ causâ comparatæ sunt omnes in rem actiones; earum verò actionum, quæ in personam sunt, eæ quidem, quæ ex contractu nascuntur, ferè omnes rei persequendæ causâ comparatæ videntur; veluti quibus mutuam pecuniam, vel in stipulatum deductam, petit actor; item commodati, depositi, mandati, pro socio, ex empto, vendito, locato, conducto. Planè, si depositi agatur eo nomine, quod tumultûs, incendii, ruinæ, naufragii causâ depositum sit, in duplum actionem prætor reddit, si modo cum ipso, apud quem depositum sit, aut cum hærede ejus, de dolo ipsius agitur; quo casu mista est actio.

§ 17. *All real actions are given for the recovery of the thing in litigation; which is the object also of almost all the personal actions which arise from contract; as the action for a* mutuum, *a* commodatum, *or on account of a stipulation, a deposit, mandate, partnership, buying and selling, letting and hireing. But, when a suit is commenced for a thing deposited by reason of a riot, a fire, or any other calamity, the prætor always gives an action for a double penalty, besides the thing deposited, if the suit is brought against the depositary himself, or against his heir, for fraud; in which case the action is mixed.*

De actionibus pœnæ persecutoriis.

§ XVIII. Ex maleficiis vero proditæ actiones, aliæ tantum pœnæ persequendæ causâ comparatæ sunt; aliæ tam pœnæ, quam rei persequendæ; et ob id mistæ sunt. Pœnam tantùm persequitur quis actione furti; sivè enim manifesti agatur, quadrupli, sivè non manifesti, dupli, de solâ pœnâ agitur: nam ipsam rem propriâ actione persequitur quis, id est, suam esse petens, sivè fur ipse eam rem possi-

§ 18. *In cases of mal-feasance, some actions are for the penalty only, and some both for the thing and the penalty; which are therefore called mixed actions. But, in an action of theft, whether manifest or not manifest, nothing more is sued for than the penalty, which, in manifest theft is quadruple, and, in theft not manifest, double: for the owner may recover by a separate action what hath been stolen from*

deat, sivè alius quilibet. Eo amplius adversus furem etiam condictio est rei.

him, if he demand the thing stolen as his own, not only against the thief, but against any other in possession of his property. The thief may also be sued by a condiction for the thing itself.

De mistis; hoc est, rei et pœnæ persecutoriis.

§ XIX. Vi autem bonorum raptorum actio mista est, quia in quadruplo rei persecutio continetur; pœna autem tripli est. Sed et legis Aquiliæ actio, de damno injuriâ dato, mista est; non solùm si adversus inficiantem in duplum agatur, sed interdum etsi in simplum quisque agat; veluti si quis hominem claudum aut luscum occiderit, qui in eo anno integer et magni pretii fuerit; tanti enim damnatur, quanti is homo eo in anno plurimi fuerit, secundùm jam traditam divisionem. Item mista est actio contra eos, qui relicta sacrosanctis Ecclesiis, vel aliis venerabilibus locis, legata vel fidei-commissi nomine, dare distulerint, usque adeò ut etiam in judicium vocarentur: tunc enim et ipsam rem vel pecuniam, quæ relicta est, dare compelluntur, et aliud tantum pro pœna; et idèo in duplum ejus fit condemnatio.

§ 19. *An action for goods taken by force, is a mixed action; because the thing taken is included under the quadruple value to be recovered by the action; and thus the penalty is but triple. The action, introduced by the law* Aquilia, *for damage injuriously done, is also a mixed action; not only when given for double value against a man denying the fact, but sometimes, when the action is only for single value; as when a man hath killed a slave, who at the time of his death was lame, or wanted an eye, but had within the year, previous to his decease, been free from any defect, and of great price; for in this case the defendant is obliged to pay as much as the slave was worth at any time within the year preceding his death. (B. 4. t. 3.) A mixed action may also be brought against those, who have delayed to deliver a legacy, or gift in trust, given for the benefit of a church, or any other holy place, until they have been called before a magistrate for that purpose; for then they are compelled to deliver up the thing, or to pay the money bequeathed, and as much more, by way of penalty; and thus they are condemned in a double amount.*

De mistis; id est, tam in rem, quam in personam.

§ XX. Quædam actiones mistam causam obtinere videntur, tam in rem, quam in personam; qualis est familiæ erciscundæ actio, quæ competit cohæredibus de dividendâ hæreditate; item communi dividundo, quæ inter eos redditur, inter quos aliquid commune est, ut id dividatur; item finium regundorum actio, qua inter eos agitur, qui confines agros habent. In quibus tribus judiciis permittitur judici rem alicui ex litigatoribus ex bono et æquo adjudicare; et, si unius pars prægravari videbitur, eum invicem certâ pecuniâ alteri condemnare.

§ 20. *Some actions, are also mixed as proceeding against the thing as well as against the Person: of this sort is the action* familiæ erciscundæ, *which may be brought by co-heirs for the partition of their inheritance; the action* de communi dividundo, *given for the division of any particular things, which, exclusive of an inheritance, are in common: and likewise the action* finium regundorum *or an action of boundary, which takes place among owners of contiguous estates. And, in these three actions, it is wholly in the power of the judge to give the ground, or thing in dispute, to either of the parties litigant, and then to oblige that party, if necessity so require, to recompense his adversary, by paying him a sum certain, in amends for any inequality in the adjudication.*

Divisio tertia.

§ XXI. Omnes autem actiones vel in simplum conceptæ sunt, vel in duplum, vel in triplum, vel in quadruplum; ulterius autem nulla actio extenditur.

§ 21. *All actions are for the single, double, triple, or quadruple value of the thing in litigation; for no action extends farther.*

De actionibus in simplum.

§ XXII. In simplum agitur, veluti ex stipulatione, ex mutui datione, ex empto, vendito, locato, conducto, mandato, et denique ex aliis quam plurimis causis.

§ 22. *The single value is sued for, when an action is given upon a stipulation, a loan, a mandate, the contract of buying and selling, letting and hireing; and also upon several other accounts.*

In duplum.

§ XXIII. In duplum agimus, veluti furti nec manifesti, damni injuriæ ex lege Aquiliâ, depositi ex quibusdam causis: item servi corrupti, quæ competit in eum, cujus hortatu consilióve servus alienus fugerit, aut contumax adversus dominum factus est, aut luxuriosè vivere cœperit, aut denique quolibet modo deterior factus sit; in quâ actione earum etiam rerum, quas fugiendo servus abstulerit, æstimatio deducitur: item ex legato, quod venerabilibus locis relictum est, secundùm ea, quæ supra diximus.

§ 23. *The double value is sued for in an action of theft* not manifest, *of injury, by the law* Aquilia, *and sometimes in an action of deposit. Also in an action brought, on account of a slave corrupted, against him, by whose advice such a slave hath fled from his master, grown disobedient, extravagant, or become in any manner the worse; and, in this action, an estimate is to be made of whatever things the slave hath stolen from his master, before his flight. An action for the detention of a legacy, left to an holy place, is also given for double value, as we have before remarked.*

In triplum.

§ XXIV. Tripli verò agimus, cum quidam majorem verâ æstimatione quantitatem in libello conventionis inserunt, ut ex hac causâ viatores, id est, executores litium, ampliorem summam, sportularum nomine, exigerent: tunc enim id, quod propter eorum causam damnum passus fuerit reus, in triplum ab actore consequetur; ut in hoc triplo etiam simplum, in quo damnum passus est, connumeretur. Quod nostra constitutio introduxit, quæ in nostro codice fulget, ex quâ procul dubio certum est, ex lege condictitiam emanare.

§ 24. *A suit may be brought for triple value, when any person inserts a greater sum, than is due to him, in the libel of convention, to the intent, that the officers of any court may exact a larger fee, or perquisite from the defendant; in which case the latter may obtain the triple value of the extraordinary fee from the plaintiff, including the fee in the triple value. The fees of officers are regulated by our constitution, and it is not to be doubted, but that the action, called* condictio ex lege, *may be given by virtue of that ordinance.*

In quadruplum.

§ XXV. Quadrupli autem agitur; veluti furti manifesti; item de

§ 25. *A suit may be commenced for quadruple value, by an action*

eo, quod metûs causâ factum sit; deque eâ pecuniâ, quæ in hoc data sit, ut is, cui datur, calumniæ causâ negotium alicui faceret, vel non faceret. Item ex lege condictitiâ, nostrâ ex constitutione, oritur, in quadruplum condemnationem imponens iis executoribus litium, qui contra nostræ constitutionis normam à reis quicquam exegerint.

for theft manifest, by an action for putting a man in fear, and by an action on account of money, given to bring on a litigious suit against some third person, or on account of money given to desist from it. A condiction ex lege, *for the quadruple value, arises also from our constitution against those officers of courts of justice, who demand any thing from the party defendant, contrary to the regulations of the said constitution.*

Subdivisio actionum in duplum.

§ XXVI. Sed furti quidem nec manifesti actio et servi corrupti à cæteris, de quibus simul locuti sumus, eo differunt, quod hæ actiones omnimodo dupli sunt; at istæ, id est, damni injuriæ ex lege Aquilia et interdum depositi, inficiatione duplicantur; in confitentem autem in simplum dantur. Sed illa, quæ de iis competit, quæ relicta venerabilibus locis sunt, non solùm inficiatione duplicatur, sed etiam si distulerit relicti solutionem, usque quo jussu magistratuum conveniatur: in confitentem verò, antequam jussu magistratuum conveniatur, solventem, simpli redditur.

§ 26. *But an action of theft* not manifest, *and an action on account of a* slave corrupted, *differ from the others, of which we have spoken, in that they always inforce a condemnation in double the value; but in an action, given by the law* Aquilia *for an injury done, and sometimes in an action of deposit, the double value may be exacted in case of denial; but if the defendant confesses, the single value only can be recovered. In an action brought for a legacy to pious uses, due to any holy place or society, the penalty is not only doubled by the denial of the defendant, but also by any delay of payment, which may be adjudged to have given a just cause for citing the defendant before a magistrate; but if the legacy be paid, before any citation issues at the command of the judge, the single value only can be required.*

Subdivisio actionum in quadruplum.

§ XXVII. Item actio de eo, quod metûs causâ factum sit, à cæteris, de quibus simul locuti sumus, eo differt, quod ejus naturâ tacitè continetur, ut, qui judicis jussu ipsam rem actori restituat, absolvatur: quod in cæteris casibus non est ita, sed omnimodo quisque in quadruplum condemnatur; quod est et in furti manifesti actione.

§ 27. *An action for putting a man in fear, differs also from other actions* in quadruplum, *because it is tacitly implied in the nature of this action, that the party, who hath obeyed the command of the judge, in restoring the things taken, may be dismissed; for, in all other actions for the fourfold value, every man must be condemned to pay the full penalty, as in the action of theft manifest.*

Divisio quarta de actionibus bonæ fidei.

§ XXVIII. Actionum autem quædam bonæ fidei sunt, quædam stricti juris. Bonæ fidei sunt hæ: ex empto, vendito; locato, conducto; negotiorum gestorum; mandati; depositi; pro socio; tutelæ; commodati; pigneratitia; familiæ erciscundæ; communi dividundo; præscriptis verbis, quæ de æstimato proponitur; et ea, quæ ex permutatione competit; et hæreditatis petitio. Quamvis enim usque adhuc incertum erat, inter bonæ fidei judicia connumeranda hæreditatis petitio esset, an non; nostra tamen constitutio apertè, eam esse bonæ fidei, disposuit.

§ 28. *The fourth division is into actions of good faith, and actions of strict right. Those of good faith are the following;* viz. *actions of buying and selling, letting and hireing; of affairs transacted, of mandate, deposit, partnership, tutelage, loan, mortgage; of the partition of an inheritance, or the division of any thing or things, which belong in common to several persons; also actions in prescribed words, which are either estimatory, or derived from commutation; and lastly the demand of an inheritance: for although it hath long been doubtful to what class this action belonged; our constitution hath clearly numbered it among actions of good faith.*

De rei uxoriæ actione, in ex stipulatu actionem transfusâ.

§ XXIX. Fuerat antea et rei uxoriæ actio una ex bonæ fidei judiciis: sed cum, pleniorem esse ex stipulatu actionem invenientes, omne jus, quod res uxoria antea ha-

§ 29. *The action* rei uxoriæ *for the recovery of a marriage portion, was formerly numbered among the actions of good faith; but when, upon finding the action of stipulation to*

bebat, cum multis divisionibus, in actionem ex stipulatu, quæ de dotibus exigendis proponitur, transtulerimus, merito rei uxoriæ actione sublata, ex stipulatu actio, quæ pro ea introducta est, naturam bonæ fidei judicii tantum in exactione dotis meruit, ut bonæ fidei sit; sed et tacitam ei dedimus hypothecam. Præferri autem aliis creditoribus in hypothecis tunc censuimus, cum ipsa mulier de dote suâ experiatur, cujus solius providentiâ hoc induximus.

be more full and advantageous, we abrogated the action rei uxoriæ, *and transferred all its effects, with the addition of many other powers, to the action of stipulation given to recover marriage portions, we then not only thought, that this action of stipulation, as far as it related to marriage portions, deserved to be numbered with actions of good faith, but we also added to it by implication, the effect of a mortgage: and we judged it proper, that women, in whose sole behalf we have thus ordained, should be preferred to all other creditors by mortgage, whenever they themselves sue for their marriage portions.*

De potestate judicis in judicio bonæ fidei, et de compensationibus.

§ XXX. In bonæ fidei judiciis, libera potestas permitti videtur judici ex bono et æquo æstimandi, quantum actori restitui debeat. In quo et illud continetur, ut, si quid invicem præstare actorem oporteat, eo compensato, in reliquum is, cum quo actum est, debeat condemnari. Sed et in stricti juris judiciis ex rescripto divi Marci, opposita doli mali exceptione, compensatio inducebatur. Sed nostra constitutio easdem compensationes, quæ jure aperto nituntur, latius introduxit, ut actiones ipso jure minuant, sivè in rem, sivè in personam, sivè alias quascunque; exceptâ solâ depositi actione, cui, aliquid compensationis nomine opponi, sanè iniquum esse credimus; ne, sub prætextu com-

§ 30. *In all actions of good faith a full power is given to the judge of calculating, according to the rules of justice and equity, how much ought to be restored to the plaintiff; and of course, when the plaintiff is found to be indebted to the defendant in a less sum, it is in the power of the judge to allow a compensation, and to condemn the defendant in the payment of the difference; and, even in actions of strict right, the emperor* Marcus *introduced a compensation by opposing an exception of fraud: but we have extended compensations much farther by our constitution, when the debt of the defendant is evident; so that actions of strict right, real, personal, or of whatever kind may be diminished by compensation;*

pensationis, depositarum rerum quis exactione defraudetur.

except only an action of deposit, against which we have not judged it proper to permit any compensation to be alledged; lest the pretence of compensation should give color and encouragement to fraud.

cip.

De actionibus arbitrariis.

§ XXXI. Præterea, actiones quasdam arbitrarias, id est, ex arbitrio judicis pendentes, appellamus; in quibus nisi arbitrio judicis is, cum quo agitur, actori satisfaciat, veluti rem restituat, vel exhibeat, vel solvat, vel ex noxali causâ servum dedat, condemnari debeat. Sed istæ actiones tam in rem, quam, in personam, inveniuntur; in rem; veluti Publiciana, Serviana de rebus coloni, quasi Serviana, quæ etiam hypothecaria vocatur: in personam; veluti quibus de eo agitur, quod vi aut metûs causâ, aut dolo malo, factum est; item cum id, quod certo loco promissum est, petitur: ad exhibendum quoque actio ex arbitrio judicis pendet. In his enim actionibus, et cæteris similibus, permittitur judici ex bono et æquo, secundùm cujusque rei, de quâ actum est, naturam, æstimare, quemadmodùm actori satisfieri oporteat.

§ 31. *Some actions moreover we call arbitrary, as depending upon the discretion of the judge; for, in these, if the party do not at the decree of the court, exhibit whatever is required, restore the thing in litigation, pay the value of it, or give up a slave in consequence of an action of malfeasance, he ought to be condemned. Of these arbitrary actions some are real and some personal: real, as the action* Publiciana, Serviana, *and* quasi-Serviana, *which is likewise called hypothecary: others are personal, as those, by which a suit is commenced on account of something done by force, fear or fraud; or on account of something, which was promised to be paid or restored in a certain place; and the action* ad exhibendum, *which was given to the intent, that something particular should be exhibited, is also of the same kind: in these and the like actions, the judge may determine, according to equity and the nature of the thing sued for, in what manner and proportion the plaintiff ought to receive satisfaction.*

Quinta divisio, de incertæ quantitatis petitione.

§ XXXII. Curare autem debet judex, ut omninò, quantum possi-

§ 32. *A judge ought, as much as possible, so to frame his sentence,*

bile ei sit, certæ pecuniæ vel rei sententiam ferat; etiamsi de incertâ quantitate apud eum actum est.

that it may be given for a thing or sum certain; although the claim, upon which the sentence is founded, may be for an incertain sum or quantity.

De pluris petitione.

§ XXXIII. Si quis agens intentione suâ plus complexus fuerit, quam ad eum pertineat, causâ cadebat, id est, rem amittebat; nec facilè in integrum restituebatur à prætore, nisi minor erat xxv annis; huic enim, sicùt in aliis causis, causâ cognitâ, succurrebatur, si lapsus juventute fuerat; ita et in hac causâ succurri solitum erat. Sanè, si tam magna causa justi erroris interveniebat, ut etiam constantissimus quisque labi posset, etiam majori xxv annis succurrebatur; veluti si quis totum legatum petierit, post deinde prolati fuerint codicilli, quibus aut pars legati adempta sit, aut quibusdam aliis legata data sint; quæ efficiebant, ut plus petisse videretur petitor, quam dodrantem; atque ideò lege Falcidiâ legata minuebantur. Plus autem quatuor modis petitur; re, tempore, loco, et causâ. Re, veluti si quis pro decem aureis, quæ ei debebantur, viginti petierit; aut si is, cujus ex parte res est, totam eam, vel majorem partem, suam esse intenderit. Tempore, veluti si quis ante diem vel ante conditionem petierit: qua enim ratione qui tardius solvit, quam solvere deberet, minus solvere intelligitur, eâdem ratione, qui præmaturè petit, plus petere vide-

§ 33. *Formerly, if a plaintiff claimed more than his due, he failed in his cause; that is, he lost his debt: nor was it easy for him to be reinstated by the prætor, unless he was under the age of 25 years: for in this, as well as in other cases, it was usual to aid minors, if it appeared that the error was owing to their youth; and if the error was such, that a skilful person might have been led into it, then even persons of full age might have been aided by the magistrate: for example, if a legatee had demanded his whole legacy, and codicils were afterwards (unexpectedly) produced, by which a part of it was revoked, or new legacies bequeathed to other persons, so that the plaintiff appeared to have demanded more than three fourths of his legacy; because it was subject to a diminution by the law* falcidia; *yet, in such case, the legatee would be relieved. A man may demand more than what is due to him in four several respects,* viz. *in respect to the thing itself; to time; to place; and to the cause. In respect to the thing; as when the plaintiff, instead of ten* aurei, *due to him, demands twenty: or if, when he owns but part of some particular thing, he claims the whole or a greater share*

tur. Loco plus petitur, veluti cum quis id, quod certo loco sibi dari stipulatus est, alio loco petit sinè commemoratione illius loci, in quo sibi dari stipulatus est; verbi gratiâ, si is, qui ita stipulatus fuerit, *Ephesi dare spondes;* Romæ purè intendat, sibi dari oportere. Ideò autem plus petere intelligitur, quia utilitatem, quam haberet promissor, si Ephesi solveret, adimit ei purâ intentione: propter quam causam alio loco petenti arbitraria actio proponitur; in quâ scilicet ratio habetur utilitatis, quæ promissori competitura fuisset, si illo loco solveret, quo se soluturum spopondit. Quæ utilitas plerùmque in mercibus maxima invenitur; veluti vino, oleo, frumento, quæ per singulas regiones diversa habent pretia. Sed et pecuniæ numeratæ non in omnibus regionibus sub iisdem usuris fœnerantur. Si quis tamen Ephesi petat, id est, eo loco petat, in quo, ut sibi detur, stipulatus est, purâ actione rectè agit: idque etiam prætor demonstrat; scilicet, quia utilitas solvendi, salva est promissori. Huic autem, qui loco plus petere intelligitur, proximus est, qui causâ plus petit: ut ecce, si quis ita à te stipuletur, *hominem Stichum, aut decem aureos, dare spondes;* deinde alterum petat, veluti hominem tantum, aut decem aureos tantum. Ideò autem plus petere intelligitur, quia in eo genere stipulationis promissoris est electio, utrum pecuniam, an hominem, solvere malit: qui igitur pecuniam tantum, vel ho-

than he is intitled to. In respect to time, as when the plaintiff makes his demand before the day of payment, or before the time of the performance of a condition; for, as he, who does not pay so soon as he ought, is always understood to pay less than he ought, so, by parity of reasoning, whoever sues prematurely, demands more than his due. In respect to place; as when any person requires that something stipulated to be delivered at a certain place, should be delivered at some other place, without noticing the place originally stipulated; as if Titius, *should stipulate in these words;* do you promise to give such a particular thing at *Ephesus? and should afterwards declare upon a contract to deliver at* Rome; *for* Titius *would thus be understood to demand more than his due, by endeavouring to deprive his debtor of the advantage he might have had in paying or delivering at* Ephesus. *It is on this account, that an arbitrary action is given to him, who would demand payment in a place different from that agreed upon; for, in that action, the advantage, which might have accrued to the debtor, by paying his debt in the place stipulated, is taken into consideration. This advantage is generally found the greatest in merchandise; as in wine, oil, corn, &c. which, in different places, bear different prices; and, indeed, money itself is not lent every where at the same interest. But, if a man would sue the performance of a stipulation*

minem tantum, sibi dari oportere intendit, eripit electionem adversario, et eo modo suam quidem conditionem meliorem facit, adversarii verò sui deteriorem. Quâ de causâ talis in eâ re prodita est actio, ut quis intendat hominem Stichum aut aureos decem sibi dari oportere, id est, ut eodem modo peteret, quo stipulatus est. Præterea, si quis generaliter hominem stipulatus sit, et specialiter Stichum petat; aut generaliter vinum stipulatus sit, et specialiter campanum petat; aut generaliter purpuram stipulatus sit, deinde specialiter Tyriam petat; plus petere intelligitur, quia electionem adversario tollit, cui stipulationis jure liberum fuit aliud solvere, quam quod peteretur. Quinetiam licèt vilissimum sit, quod quis petat; nihilominus plus petere intelligitur; quia sæpè accidit, ut promissori facilius sit illud solvere, quod majoris pretii est. Sed hæc quidem antea in usu fuerant; postea vero lex Zenoniana, et nostra, rem coarctavit. Et, si quidem tempore plus fuerit petitum, quid statui oporteat, Zenonis divæ memoriæ loquitur constitutio. Sin autem quantitate, vel alio modo, plus fuerit petitum, in omne, si quod fortè damnum ex hac causâ accideret ei, contra quem plus pe-

at Ephesus, *or at any other place, where it was agreed, that it should be performed, he may legally commence his suit by a pure action, that is without mentioning the place; and this the prætor allows of, inasmuch as the debtor does not lose any advantage. Next to him, who demands more than his due, in regard to place, is he, who demands more than his due, in regard to the cause; as for instance, if* Titius *stipulate thus with you:* do you promise to give either your slave *Stichus* or ten aurei? *and then demand either the slave specially, or the money specially; in this case* Titius *would be adjudged to have demanded more than his due, the right of election being in you by whom the promise was made; and therefore, when* Titius *sues either for the money specially, or for the slave, he takes away your election, and betters his own condition, by making yours worse: and it is upon this account, that an action has been given, by which the party agent or plaintiff may make his demand conformable to the stipulation, and claim either the slave or the money. And farther, if a man should stipulate generally, that wine, purple or a slave, should be given him, and should afterwards sue for the wine of* Campania, *the purple of* Tyre, *or*

tum fuerit, commissa tripli condemnatione, sicùt supra diximus, emendatur.

the slave Stichus *in particular, he would then be adjudged to have demanded more than his due; for the power of election would thus be taken from the adverse party, who was not bound by the stipulation to pay the thing specifically demanded; and although, in any of these cases, the thing sued for should be of little or no value, yet the demandant would be thought to claim more than his due; because it is often easier for the debtor to pay the thing stipulated, although it may be of greater value than the thing demanded. Such was the law according to the ancient practice, in regard to an over-demand,* viz. *that the demandant should lose even that, which was really due to him. But this law has been greatly restrained by the constitution of* Zeno *the emperor, and by our own; for, if more than is due be demanded in respect of time, the judge must be directed in his proceeding by the constitution of that emperor of glorious memory; but, if in respect of quantity, or on any other account, then the loss suffered by him, upon whom the demand is made, must be recompensed, as we have before declared, by a decree of triple damages against the plaintiff.*

De minoris summæ petitione.

§ XXXIV. Si minus intentione suâ complexus fuerit actor, quam ad eum pertineat; veluti si, cum ei decem aurei deberentur, quinque ibi dari oportere intenderit; aut si, cum totus fundus ejus esset, par-

§ 34. *If a plaintiff sue for less, than he has a claim to, demanding, for instance, only five* aurei, *when ten are due; or the moiety of an estate, when the whole belongs to him; he acts safely; for the judge, in con-*

tem dimidiam suam esse petierit; sinè periculo agit: in reliquum enim nihilominus judex adversarium eodem judicio ei condemnat, ex constitutione divæ memoriæ Zenonis.

sequence of Zeno's *constitution, may nevertheless condemn the adverse party, under the same process, to the payment or delivery of all, which appears of right to belong to the plaintiff.*

Si aliud pro alio petatur.

§ XXXV. Si quis aliud pro alio intenderit, nihil eum periclitari placet, sed in eodem judicio, cognitâ veritate, errorem suum corrigere ei permittitur; veluti si is, qui hominem *Stichum* petere deberet, *Erotem* petierit; aut si quis ex testamento dari sibi oportere intenderit, quod ex stipulatu debetur.

§ 35. *When a plaintiff demands one thing instead of another, he risks nothing by the mistake, which he is allowed to correct under one and the same process: as if a litigant should demand the slave* Erotes, *instead of the slave* Stichus, *or should claim, as due by testament, what is found to be due upon stipulation.*

Divisio sexta. De peculio.

§ XXXVI. Sunt præterea quædam actiones, quibus non semper solidum, quod nobis debetur, persequimur, sed modo solidum persequimur, modo minus; ut ecce, si in peculium filii servive agamus: nam, si non minus in peculio sit, quam persequimur, in solidum dominus paterve condemnatur; si verò minùs inveniatur, eatenùs condemnat judex, quatenùs in peculio sit. Quemadmodum autem peculium intelligi debeat, suo ordine proponemus.

§ 36. *There are also some actions, by which we do not always sue for the whole, which is due to us; but for the whole, or less, as it proves to be most expedient; thus, when a suit is brought against the* peculium *of a son or a slave, if the* peculium *be sufficient to answer the demand, the father or master must be condemned to pay the whole debt; but, if the* peculium *be not sufficient, the judge can condemn the defendants only to the extent of its value. We will hereafter explain, in its proper place, what we mean by the term* peculium.

De repetitione dotis.

§ XXXVII. Item, si de dote in judicio mulier agat, placet, eatenùs maritum condemnari debere, qua-

§ 37. *Also, if a woman bring suit for the restitution of her marriage portion, the man must be condemned*

tenùs facere possit; id est, quatenùs facultates ejus patiuntur. Itaque, si dotis quantitati concurrant facultates ejus, in solidum damnatur; sin minus, in tantum, quantum facere potest. Propter retentionem quoque dotis repetitio minuitur; nam ob impensas, in res dotales factas, marito quasi retentio concessa est, quia ipso jure necessariis sumptibus dos minuitur; sicùt ex latioribus digestorum libris cognoscere licet.

to pay as far as he is able; i. e. as far as his ability or solvency will permit: therefore, if the portion demanded and the ability of the man be equal, he must be adjudged to satisfy the whole demand; but, if his ability be less than the claim, he must nevertheless be condemned to pay as much as he is able. But the claim of a woman may in this case be lessened by a retention; for the husband is permitted to retain an equivalent for whatever he hath necessarily expended upon the estate given with his wife, as a marriage portion; but this will fully appear by a perusal of the digests, to which the reader is referred.

De actione adversus parentem, patronum, socium, et donatorem.

§ XXXVIII. Sed et, si quis cum parente suo patronove agat, item si socius cum socio judicio societatis agat, non plus actor consequitur, quam adversarius ejus facere potest. Idem est, si quis ex donatione suâ conveniatur.

§ 38. *If any person sue his parent, patron, or partner, the plaintiff can not obtain sentence for a greater sum, than his adversary is able to pay; it is the same when a donor is sued on account of his donation.*

De compensationibus.

§ XXXIX. Compensationes quoque oppositæ plerùmque efficiunt, ut minus quisque consequatur, quam ei debeatur. Nam ex bono et æquo habitâ ratione ejus, quod invicèm actorem ex eâdem causâ præstare oportet, poterit judex in reliquum eum, cum quod actum est, condemnare; sicùt jam dictum est.

§ 39. *When a compensation is alledged by the defendant, it generally happens, that the plaintiff recovers less than his demand; for it is in the power of the judge, as we have before declared, to make an equitable deduction from the demand of the plaintiff of whatever he owes to the defendant, and to condemn the defendant to the payment only of the remainder; as it hath already been observed.*

De eo, qui bonis cessit.

§ XL. Cum eo quoque, qui creditoribus suis bonis cessit, si postea aliquid acquisierit, quod idoneum emolumentum habeat, ex integro in id, quod facere potest, creditores experiuntur. Inhumanum enim erat, spoliatum fortunis suis in solidum damnari.

§ 40. *Creditors also, to whom a debtor hath made a cession of his goods, may afterwards, if he hath gained any considerable acquisition, bring a fresh suit against him, for as much as he is able to pay, but not more; for it would be inhuman to condemn a man* in solidum, *who hath already been deprived of his whole fortune.*

TITULUS SEPTIMUS.

QUOD CUM EO, QUI IN ALIENA POTESTATE EST, NEGOTIUM GESTUM ESSE DICITUR.

D. xiv. T. 5. C. iv. T. 16.

Scopus et nexus.

QUIA tamen superius mentionem habuimus de actione, quâ in peculium filiorum servorumque agitur, opus est, ut de hac actione et de cæteris, quæ eorundem nomine in parentes dominosve dari solent, diligentius admoneamus. Et quia, sivè cum servis negotium gestum sit, sivè cum iis, qui in potestate parentum sunt, eadem fere jura servantur, ne verbosa fiat disputatio, dirigamus sermonem in personam servi dominique, idem intellecturi de liberis quoque et parentibus, quorum in potestate sunt; nam, si quid in his propriè servetur, separatim ostendemus.

We have already mentioned the action which may be brought against the peculium, *or separate estate of a son or a slave; it is now necessary to speak of it more fully, and also of some other actions, which are allowed to children and slaves against their parents and masters. But, as the law is almost the same, whether an affair be transacted with a slave, or with one who is under the power of his parent, to avoid prolixity we will treat only of slaves and their masters, leaving what we say of them to be understood also of parents and children under power; for whatever is peculiar to children and parents, we shall point out separately.*

De actione *quod jussu.*

§ I. Si igitur jussu domini cum servo negotium gestum erit, in solidum prætor adversus dominum actionem pollicetur; scilicet quia is, qui ita contrahit, fidem domini sequi videtur.

§ 1. *For any business negotiated by a slave acting under the command of his master, the prætor will give an action against the master for the whole value of the transaction; for whoever contracts with a slave, is presumed to have done it on a confidence in the master.*

De exercitariâ et institoriâ actione.

§ II. Eâdem ratione prætor duas alias in solidum actiones pollicetur; quarum altera exercitoria, altera institoria, appellatur. Exercitoria tunc habet locum, cum quis servum suum magistrum navi præposuerit, et quid cum eo, ejus rei gratiâ, cui præpositus erit, contractum fuerit. Ideò autem exercitoria vocatur, quia exercitor is appellatur, ad quem quotidianus navis quæstus pertinet. Institoria tunc locum habet, cum quis tabernæ fortè, aut cuilibet negotiationi, servum suum præposuerit, et quid cum eo, ejus rei causa, cui præpositus erit, contractum fuerit. Ideò autem institoria appellatur, quia, qui negotiationibus præponuntur, institores vocantur. Istas tamen duas actiones prætor reddit, et si liberum quis hominem, aut alienum servum, navi aut tabernæ aut tabernæ aut cuilibet negotiationi præposuerit; scilicet, quia eadem æquitatis ratio etiam eo casu interveniat.

§ 2. *The prætor also gives two other actions* in solidum *upon the same motive; the one* exercitoria, *the other* institoria. *The action* exercitoria *takes place, when a master hath made his slave commander of a vessel, and some contract hath been entered into with the slave in that capacity. This action is named* exercitoria, *because he to whom the daily profits of a ship belong, is called* exercitor. *The action* institoria *is made use of, when a master hath given his slave the management of a shop, or committed any particular affair to his direction, on account whereof some one hath been induced to enter into a contract with the slave; and this action is called* institoria, *because all persons, to whom a negotiation is committed, are denominated* institores. *The prætor hath likewise been induced, by the same equity, to give these two actions against any man, who employs a free person, or the slave of another, in the management of a ship, a warehouse, or any particular affair.*

De tributoria.

§ III. Introduxit et aliam actionem prætor, quæ tributoria vocatur; namque, si servus in peculiari merce, sciente domino, negotietur, et quid cum eo ejus rei causâ contractum erit, ita prætor jus dicit, ut, quicquid in his mercibus erit, quodque indè receptum erit, id inter dominum, si quid ei debebitur, et cæteros creditores, pro ratâ portione distribuatur: et ideò tributoria vocatur, quia ipsi domino distributionem prætor permittit. Nam, si quis ex creditoribus queratur, quasi minus ei tributum sit, quam oportuerit, hanc ei actionem accommodat, quæ tributoria appellatur.

§ 3. *The prætor hath also introduced another action called* tributoria; *for, if a slave with the knowledge of his master, trade upon his* peculium, *and contracts are thereupon made with him, the prætor ordains, that the merchandize, or money, arising from his traffic, shall be distributed between the master, (if he has any just claim,) and the rest of the creditors in a ratable proportion; and it is called* tributoria *because the master himself is permitted to make the distribution: but, if any creditor complain, that too small a share hath been allowed him, the prætor will give this action, called* tributoria.

De peculio, et de in rem verso.

§ IV. Præterea introducta est actio de peculio, deque eo, quod in rem domini versum erit; ut quamvis sinè voluntate domini negotium gestum erit, tamen, sivè quid in rem ejus versum fuerit, id totum præstare debeat; sivè quid non sit in rem ejus versum, id eatenùs præstare debeat, quatenùs peculium patitur. In rem autem domini versum intelligitur, quicquid necessario in rem ejus impenderit servus, veluti si mutuatus pecuniam creditoribus ejus solverit, aut ædificia ruentia fulserit, aut familiæ frumentum emerit, vel etiam fundum, aut quamlibet aliam rem necessariam mercatus erit. Itaque, si ex decem puta aureis, quos

§ 4. *The action concerning a* peculium, *and things converted to the profit of the master, hath likewise been introduced by the prætor; for although business hath been transacted by a slave, without consent of his master, yet, where the profit arising is converted to the master's benefit, he ought to be answerable: and, although the master should derive no emolument, he ought to be answerable to the amount of the* peculium. *Whenever any thing is necessarily expended by a slave upon the master's affairs, it is understood to be a conversion to his benefit; as if a slave who hath borrowed money, should pay the debts of his master, repair his buildings, purchase an es-*

servus tuus à Titio mutuo accepit, creditori tuo quinque aureos solverit, reliquos verò quinque quolibet modo consumpserit, pro quinque quidem in solidum damnari debes; pro cæteris verò quinque eatenùs, quatenùs in peculio sit. Ex quo scilicet apparet, si toti decem aurei in rem tuam versi fuerint, totos decem aureos Titium consequi posse: licèt enim una sit actio, quâ de peculio, deque eo, quod in rem domini versum sit, agitur; tamen duas habet condemnationes. Itaque judex, apud quem de eâ actione agitur, ante dispicere solet, an in rem domini versum sit; nec aliter ad peculii æstimationem transit, quam aut nihil in rem domini versum intelligatur, aut non totum. Cum autem quæritur, quantum in peculio sit, ante deducitur, quicquid servus domino, eivè, qui in potestate ejus sit, debet; et, quod superest, id solum peculium intelligitur. Aliquando tamen id, quod ei debet servus, qui in potestate domini sit, non deducitur ex peculio; veluti si is in ipsius peculio sit: quod eo pertinet, ut, si quid vicario suo servus debeat, id ex peculio ejus non deducatur.

tate, provision, or any other useful thing: therefore, if out of ten aurei, *borrowed by a slave, he should pay only five to his master's creditors, and squander the rest, the master would be liable to the payment* in solidum *of the five* aurei, *but, as to the other five, he could be obliged to pay only so much as the* peculium *would answer; hence it will appear, that, if all the ten* aurei *had been converted to the master's emolument, the lender might have recovered the whole; for although it is one and the same action, against a* peculium, *and for the recovery of what a slave hath converted to his master's use, yet it carries with it two different condemnations; hence, the judge does not estimate the value of the* peculium, *until he has examined how much if any hath been expended for the service of the master: but, when the judge proceeds to the valuation of the* peculium, *a deduction is made of what the slave owes to his master, or to any other under the power of his master, and the remainder only is considered as* peculium. *But it sometimes happens, that what one slave owes to another under the power of the same master, is not deducted; as when the slave who is the creditor, composes a part of his debtor's* peculium; *for, if a slave be indebted to his vicarial slave, this debt cannot be deducted from the* peculium.

De concursu dictarum actionum.

§ V. Cæterum dubium non est, quin is quoque, qui jussu domini

§ 5. *It is nevertheless certain that he, who hath contracted with*

contraxerit, cuique institoria vel exercitoria actio competit, de peculio, deque eo, quod in rem domini versum est, agere possit. Sed erit stultissimus, si, omissâ actione, quâ facillimè solidum ex contractu consequi possit, se ad difficultatem perducat probandi, in rem domini versum esse, vel habere servum peculium, et tantum habere, ut solidum sibi solvi possit. Is quoque, cui tributoria actio competit, æquè de peculio, et de in rem verso, agere potest; sed sanè huic modo tributoria expedit agere, modo de peculio, et de in rem verso. Tributoria ideò expedit agere, quia in ea domini conditio præcipua non est; id est, quod domino debetur, non deducitur, sed ejusdem juris est dominus, cujus et cæteri creditores: at, in actione de peculio, ante deducitur, quod domino debetur; et in id, quod reliquum est, creditori dominus condemnatur. Rursus de peculio ideò expedit agere, quod in hac actione totius peculii ratio habetur; at in tributoriâ ejus tantùm, quo negotiatur; et potest quisque tertiâ fortè parte peculii, aut quartâ, vel etiam minimâ, negotiari; majorem autem partem in prædiis aut fœnebri pecunia habere. Prout ergò expedit, ita quisque vel hanc actionem, vel illam, eligere debet. Certè, qui potest probare,

a slave at the command of the master and is intitled either to the action institoria *or* exercitoria, *is also intitled to the action* de peculio *and* de in rem verso: *but it would be highly imprudent in any party to relinquish an action, by which he could easily recover his whole demand, and, by recurring to another, reduce himself to the difficulty of proving, that the money he lent to the slave was converted to the use of the master, or that the slave is possessed of a* peculium *sufficient to answer the whole debt. He also, to whom the action* tributoria *is given, is equally intitled to the action* de peculio, *and* de in rem verso; *but it is expedient, in some cases, to use the one, and in some cases the other: but the action* tributoria *is generally preferable, because, in this, the condition of the master is not principally regarded;* i. e. *there is no previous deduction made of what is due to him, his title being esteemed in the same light with that of other creditors: but, in the action* de peculio, *the debt due to the master is first deducted, and he is condemned only to distribute the remainder among the creditors. Again, in some cases, it may be more convenient to bring the action* de peculio, *because it affects the whole* peculium, *whereas the action* tributoria *regards only so much of it as hath been made*

in rem domini versum esse, de in rem verso agere debet.

use of in traffic; and it is possible, that a slave may have trafficked only with a third, a fourth, or some very small part, and that the rest consists of lands, slaves, or money, lent at interest. Therefore it behoves every man to chuse that remedy, which may be most beneficial to him; but, if the creditor can prove a conversion to the use of the master, he ought to proceed by the action de in rem verso.

De filiis-familias.

§ VI. Quæ diximus de servo et de domino, eadem intelligimus et de filio et filiâ, et nepote et nepte, et patre avove, cujus in potestate sunt.

§ 6. *What we have said, concerning a slave and his master, takes place equally in regard to children under power, and their parents.*

De senatus-consulto Macedoniano.

§ VII. Illud propriè servatur in eorum persona, quod senatus-consultum Macedonianum prohibuit mutuas pecunias dari eis, qui in potestate parentis sunt; et ei, qui crediderit, denegatur actio tam adversus ipsum filium filiamve, nepotem neptemve, (sivè adhuc in potestate sint, sivè morte parentis, vel emancipatione, suæ potestatis esse cæperint,) quam adversus patrem avumvè, sivè eos habeat adhuc in potestate, sivè emancipaverit. Quæ ideò senatus prospexit, quia sæpe onerati ære alieno creditarum pecuniarum, quas in luxuriam consumebant, vitæ parentum insidiabantur.

§ 7. *But children are, in some respects, particularly regarded by the* Macedonian *decreee of the senate, which prohibits money to be lent them, while under power of their parents; for creditors are not suffered to bring any action, either against the children, even after they are emancipated, or against their parents, who emancipated them. This caution was adopted by the senate, because young heirs, loaded with debts contracted for luxury, have laid snares against the lives of their parents.*

De actione directâ in patrem vel dominum.

§ VIII. Illud in summa admonendi sumus, id, quod jussu patris

§ 8. *In fine, we may observe, that whatever hath been contracted*

dominive contractum fuerit, quodque in rem ejus versum erit, directo quoque possē à patre dominove condici, tanquam si principaliter cum ipso negotium gestum esset. Ei quoque, qui exercitoria vel institoria actione tenetur, directo posse condici placet, quia hujus quoque jussu contractum intelligitur.

for at the command of a parent or master, and converted to their use, may be recovered by a direct action against the father or master in the same manner, as if the contract had been originally made with them. And he, who is liable to the action institoria *or* exhibitoria, *may also be sued by a direct action, inasmuch as the contract is presumed to have been made at his command.*

TITULUS OCTAVUS.

DE NOXALIBUS ACTIONIBUS.

D. ix. T. 4. C. iii. T. 41.

De servis.

EX maleficiis servorum, veluti si furtum fecerint, aut bona rapuerint, aut damnum dederint, aut injuriam commiserint, noxales actiones proditæ sunt; quibus domino damnato permittitur aut litis æstimationem sufferre, aut ipsum hominem noxæ dedere.

Summa.

Noxal actions are given on account of the offences of slaves; as when a slave commits a theft or robbery, or does any damage or injury. And, when the master or owner of a slave is condemned upon this account, it is in his option either to pay the estimate of the damage done, or deliver up his slave as a recompence.

Quid sit noxa et noxia.

§ I. Noxa autem est ipsum corpus, quod nocuit; id est, servus: noxia ipsum maleficium; veluti furtum, rapina, damnum, injuria.

§ 1. Noxa *is the slave, the offender.* Noxia *is the offence, whether theft, damage, rapine, or injury.*

Ratio harum actionum.

§ II. Summâ autem ratione permissum est noxæ deditione fungi; namque erat iniquum, nequitiam eorum ultra ipsorum corporum dominis damnosam esse.

§ 2. *It is reasonably permitted to the master to deliver up the offending slave: for it would be unjust to make the master liable, beyond the body of the slave himself.*

Effectus noxæ deditionis.

§ III. Dominus, noxali judicio servi sui nomine conventus, servum actori noxæ dedendo liberatur; nec minus in perpetuum ejus servi dominium à domino transfertur: sin autem damnum ei, cui deditus est, servus resarcierit quæsitâ pecuniâ, auxilio prætoris, invito domino, manumittetur.

§ 3. *In a noxal action brought against a master, he may clear himself by giving up his slave to the plaintiff, in whom the property will become absolutely vested; but, if the slave can satisfy his new master in money for the damage, he may be manumitted on application to the prætor, though his new master should be unwilling.*

De origine harum actionum.

§ IV. Sunt autem constitutæ noxales actiones, aut legibus, aut edicto prætoris; legibus, veluti furti ex lege xii tabularum, damni injuriæ ex lege Aquilia; edicto prætoris, veluti injuriarum, et vi bonorum raptorum.

§ 4. *Noxal actions are appointed either by the laws, or by the edict of the prætor. By the laws, as for theft, by the law of the* twelve tables; *for injurious damage, by the law* Aquilia; *for injuries and goods taken by force, by the prætor's edict.*

Qui conveniuntur noxali actione.

§ V. Omnis autem noxalis actio capit sequitur; nam, si servus tuus noxam commiserit, quamdiu in tuâ potestate sit, tecum actio est: si autem in alterius potestatem pervenerit, cum illo incipit actio esse: at, si manumissus fuerit, directo ipse tenetur, et extinguitur noxæ deditio. Ex diverso quoque directa actio noxalis esse incipit; nam, si liber homo noxiam commiserit, et is servus tuus esse cœpe-

§ 5. *No real actions follow the person; thus, the master is liable while the slave belongs to him; if the slave become subject to a new master, then he becomes liable; but, if the slave be manumitted, he may be prosecuted by a direct action; and the* noxæ deditio, *is extinguished. But an action, which was at first direct, may afterwards become noxal; for if a free man, guilty of malfeasance, become a slave, (and our*

rit, (quod quibusdam casibus effici primo libro tradidimus,) incipit tecum esse noxalis actio, quæ ante directa fuisset.

first book shews in what cases this may happen,) then the direct action against the slave, is changed into a noxal action against the master.

Si servus Domino noxiam commiserit, vel contra.

§ VI. Si servus domino noxiam commiserit, actio nulla nascitur; namque inter dominum et eum, qui in potestate ejus est, nulla obligatio nasci potest. Ideòque, si in alienam potestatem servus pervenerit, aut manumissus fuerit, neque cum ipso, neque cum eo, cujus nunc in potestate sit, agi potest: unde, si alienus servus tibi noxiam commiserit, et is postea in potestate tuâ esse cœperit, interdicitur actio; quia in eum casum deducta sit, in quo consistere non potuit. Ideòque, licèt exierit de tuâ potestate, agere non potes; quemadmodum si dominus in servum suum aliquid commiserit, nec, si manumissus aut alienatus fuerit servus, ullam actionem contra dominum habere potest.

§ 6. *Although a slave commit mal-feasance against his master, yet no action is given; for no obligation can arise between a master and his slave; and if the slave pass under the power of another master, or is manumitted, no action lies either against him or his new master; whence it follows, that, if the slave of another should commit mal-feasance against you, and become your slave, the action is forbidden: for the case has arisen in which it cannot be brought. Therefore, although a slave hath passed out of your power, you cannot sue him: neither can a slave, who hath been aliened or manumitted, bring any action against his late master.*

De filiis-familiarum.

§ VII. Sed veteres quidem hoc in filiis-familiarum masculis et fœminis admisere; nova autem hominum conversatio hujusmodi asperitatem rectè respuendam esse existimavit, et ab usu communi hoc penitùs recessit. Quis enim patiatur, filium suum, et maxime filiam, in noxam alii dari? ut penè per filii corpus pater magis quam filius periclitetur; cum in filiabus etiam pudicitiæ favor hoc benè excludat.

§ 7. *The ancients indeed admitted this law of the forfeiture of the person, even in cases of children, whether male or female: but later times have rightly thought, that such rigorous proceeding, ought to be exploded; and it hath therefore passed wholly into disuse: for who could suffer a son, and more especially a daughter, to be delivered up as a forfeiture to a stranger? for, in the case of a son, the punishment of the*

Et ideò placuit, in servos tantùmmodo, noxales actiones esse proponendas; cum, apud veteres legum commentatores, invenerimus sæpius dictum, ipsos filios-familiarum pro suis delictis posse conveniri.

father would be greater, than that of the son; and, in the case of a daughter, the rules of modesty forbid the practice. It hath therefore prevailed, that noxal actions should apply to slaves only: and, we find it often laid down in the old books, that sons of a family may be sued for their own misdeeds.

TITULUS NONUS.

SI QUADRUPES PAUPERIEM FECISSE DICATUR.

D. ix. T. 1.

De actione, si quadrupes ex l. *xii* tab.

ANIMALIUM nomine, quæ ratione carent, si qua lasciviâ, aut pavore, aut feritate, pauperiem fecerint, noxalis actio lege xii tab. prodita est: quæ animalia, si noxæ dedantur, proficiunt reo ad liberationem; quia ita lex xii tabularum scripta est, ut puta, si equus calcitrosus calce percusserit, aut bos, cornu petere solitus, cornu petierit. Hæc autem actio in iis, quæ contra naturam moventur, locum habet; cæterum, si genitalis sit feritas, cessat actio. Denique, si ursus fugerit à domino, et sic nocuerit, non potest quondam dominus conveniri, quia desiit dominus esse, ubi fera evasit. Pauperis autem est damnum sinè injuriâ facientis datum; nec enim potest animal injuriam

A noxal action is given by the law of the 12 tables, *when damage is done by brute animals, through wantonness, fright, or furiousness; and when delivered up in atonement for the damage done, the defendant is cleared from the action: for it is thus written in the law of the* 12 tables, *if* a horse, apt to kick, should strike with his foot; or if an ox, accustomed to gore, should wound any man with his horns, &c. *But a noxal action takes place only when animals act contrary to their nature; for, when the ferocity of a beast is innate, no action can be given; so that, if a bear break loose from his master, and mischief be done, the master cannot be sued; for he ceased to be the master as soon as*

fecisse dici, quod sensu caret. Hæc quidem ad noxalem pertinent actionem.

the beast escaped. The word pauperies *denotes a damage, by which no injury is intended; for an animal, void of reason, cannot be said to have committed an injury. Thus much as to noxal actions.*

De actione ædilitiâ, concurrente cum actione de pauperie.

§ I. Cæterum sciendum est, ædilitio edicto prohiberi nos canem, verrem, aprum, ursum, leonem, ibi habere, qua vulgò iter fit; et, si adversùs ea factum erit, et nocitum libero homini esse dicatur, quod bonum et æquum judici videtur, tanti dominus condemnetur; cæterarum verò rerum, quanti damnum datum sit, dupli. Præter has autem ædilitias actiones, et de pauperie locum habebit; nunquam enim actiones, præsertim pœnales, de eâdem re concurrentes, alia aliam consumit.

§ 1. *It must be observed, that the edict of the Edile forbids any man to keep a dog, a boar, a bear, or a lion, where there is a public passage or highway: and, if this prohibition be disobeyed, and any freeman receive hurt, the master of the beast may be condemned at the discretion of the judge; yet, in other cases of damage, the condemnation must be in double the amount. Besides the* Edilitian *action, an action for damage, called* pauperies, *may also take place against the same person: for actions, especially penal actions, may concur on account of the same thing, without the one destroying the other.*

TITULUS DECIMUS.

DE IIS, PER QUOS AGERE POSSUMUS.

Per quos agere liceat.

NUNC admonendi sumus, agere posse quemlibet hominem aut suo nomine aut alieno. Alieno, veluti procuratorio, tutorio, curatorio; cum olim in usu fuisset, alterius

We must now remark, that any man may commence a suit, in his own name, or in that of another, as of a proctor, a tutor, or a curator; but anciently, one person could not

nomine agi non posse, nisi pro populo, pro libertate, pro tutelâ. Præterea lege Hostiliâ permissum erat furti agere eorum nomine, qui apud hostes essent, aut reipublicæ causâ abessent, quivè in eorum cujus tutelâ essent. Sed, quia hoc non minimam incommoditatem habebat, quod alieno nomine neque agere, neque excipere actionem, licebat, cœperunt homines per procuratores litigare. Nam et morbus et ætas et necessaria peregrinatio, itemque allæ multæ causæ, sæpe hominibus impedimento sunt, quo minus rem suam ipsi exequi possint.

sue in the name of another, unless in a public cause, in a cause to establish freedom, or, in a cause of tutelage. It was afterwards permitted by the law Hostilia, *that an action of theft might be brought in the names of captives; or of persons absent upon the affairs of the republic; or who were under the care of tutors. But, as it was found in later times to be highly inconvenient, that any man should be prohibited, either from suing, or defending in the name of another, it by degrees became a practice to sue by proctors; for ill health, old age, the necessity of travelling, and many other cases, continually prevent mankind from being able to prosecute their own affairs in person.*

Quibus modis procurator constituatur.

§ 1. Procurator neque certis verbis, neque præsente semper adversario, imò et plerumquè eo ignorante, constituitur: cuicunque enim permiseris rem tuam agere, aut defendere, is tuus procurator intelligitur.

§ 1. *A proctor may be appointed without any certain form of words, nor is the presence of the adverse party required; indeed it is generally done without his knowledge. Whoever is employed to sue or to defend for another, is understood to be a proctor.*

Quibus modis tutores vel curatores constituuntur.

§ II. Tutores et curatores quemadmodum constituantur, primo libro expositum est.

§ 2. *We have already explained in the first book, how tutors and curators may be appointed.*

TITULUS UNDECIMUS.

DE SATISDATIONIBUS.

D. ii. T. 8. C. ii. T. 57.

De judicio personali.

SATISDATIONUM modus alius antiquitati placuit, alium novitas per usum amplexa est. Olim enim, si in rem agebatur, satisdare possessor compellebatur, ut, si victus esset, nec rem ipsam restitueret, nec litis æstimationem, potestas esset petitori aut cum eo agendi, aut cum fide-jussoribus ejus; quæ satisdatio appellatur *judicatum solvi:* undè autem sic appelletur, facile est intelligere; namque stipulabatur quis, ut solveretur sibi, quod fuisset judicatum; multo magis is, qui in rem actione conveniebatur, satisdare cogebatur, si alieno nomine judicium accipiebat. Ipse autem, qui in rem agebat, si suo nomine petebat, satisdare non cogebatur. Procurator verò, si in rem agebat, satisdare jubebatur, *rem ratam dominum habiturum:* periculum enim erat, ne iterùm dominus de eâdem re experiretur. Tutores verò et curatores eodem modo, quo procuratores, satisdare debere, verba edicti faciebant. Sed aliquando his agentibus satisdatio remittebatur. Hæc ita erant, si in rem agebatur.

In taking security, the ancient practice differs from the modern; for merely in a real action, the defendant, in possession, was compelled to give security, so that, if he lost his cause, and could neither restore the thing itself, nor pay the value of it, the demandant might be enabled either to sue him, or his bail: and this species of bail is termed judicatum solvi: *nor is it difficult to understand, why it is so called; for as every demandant stipulated, that the thing adjudged to him should be paid, it was still more reasonable, that the person sued in a real action should be obliged to give security, if he received judgment in the name of another. A plaintiff in a real action suing in his own name, was not called to give security: but a proctor was ordered to give security, that his acts would be ratified by his principal,* rem ratam dominum habiturum; *for the danger was, lest the client should bring a fresh suit for the same thing; and by the words of the edict even tutors and curators were compellable to give security, as well as proctors, though it was sometimes remitted when they were plaintiffs. Such was the practice in real actions.*

De judicio personali.

§ I. Si verò in personam, ab actoris quidem parte, eadem obtinebant, quæ diximus in actione, quâ in rem agitur; ab ejus verò parte, cum quo agitur, siquidem alieno nomine aliquis interveniret, omnimodo satisdaret; quia nemo defensor in alienâ re sinè satisdatione idoneus esse creditur. Quod si proprio nomine aliquis judicium accipiebat in personam, *judicatum solvi* satisdare non cogebatur.

§ 1. *The rules as to security, on part of the plaintiff, which were observed in real, obtained also in personal actions; and, if the defendant proceeded in another's name, he was obliged to give caution; for no one was reputed a competent defendant in the cause of another, unless security was given: but, whenever any man was convened in a personal action if the defendant stood suit in his own name he was not compelled to give bail* judicatum solvi *(i. e. fully to comply with the judgment of the court.*

Jus novum. De reo.

§ Sed hodie hæc aliter observantur. Sivè enim quis in rem actione convenitur, sivè personali, suo nomine, nullam satisdationem pro litis æstimationè dare compellitur; sed pro snâ tantum personâ, quod in judicio permaneat usque ad terminum litis; vel committitur suæ promissioni cum jurejurando, quam juratoriam cautionem vocant; vel nudam promissionem, vel satisdationem, pro qualitate personæ suæ, dare compellitur.

§ 2. *But at present a different practice prevails; for, a defendant sued in his own name, either in a real or personal action, is not compellable to give security for the payment of the estimation of the suit, but only for his own person; to wit, that he will remain in judgment until the cause is determined; and this security is sometimes given by sureties; sometimes by a promise upon oath, which is called a juratory caution; and sometimes by a simple promise without oath, according to the quality of the defendant.*

De procuratore actoris.

§ III. Sin autem per procuratorem lis vel infertur vel suscipitur, in actoris quidem personâ, si non mandatum actis insinuatum est, vel præsens dominus litis in judicio procuratoris sui personam confirmaverit,

§ 3. *But, where a suit is commenced or defended by a proctor, if the proctor of the plaintiff, does not either enrol a mandate of appointment in the acts of court, (that is, file his power of attorney) or cause*

ratam rem dominum habiturum, satisdationem procurator dare compellitur: eodem observando et si tutor vel curator, vel aliæ tales personæ, quæ alienarum rerum gubernationem receperunt, litem quibusdam per alium inferunt.

his client to nominate him publicly, he is obliged to give security, that his client will ratify his proceeding. Such is the rule also if a tutor, curator, or agent, commences suit by a proctor.

De procuratore rei præsentis.

§ IV. Si verò aliquis convenitur, siquidem præsens procuratorem dare paratus est, potest vel ipse in judicium venire, et sui procuratoris personam per *judicatum solvi* satisdationem solemni stipulatione firmare; vel extra judicium satisdationem exponere, per quam ipse sui procuratoris fidejussor existat pro omnibus *judicatum solvi* satisdationis clausulis: ubi et de hypotheca suarum rerum convenire compellitur, sivè in judicio promiserit, sivè extra judicium caverit, ut tam ipse quam hæredes ejus obligentur. Aliâ insuper cautelâ, satisdatione propter personam ipsius exponendâ, quod tempore sententiæ recitandæ in judicium veniet, vel, si non venerit, omnia dabit fidejussor quæ in condemnatione continentur, nisi fuerit provocatum.

§ 4. *When a party is sued, and is ready to nominate a proctor, he may appear in open court, and confirm the nomination by giving the caution* judicatum solvi *under the usual stipulation; or he may appear out of court, and become himself the surety, that his proctor will perform all the covenants in the instrument of caution; and whether this be done in court, or out of court, he must make his estate chargeable, that his heirs, as well as himself, may be bound. And a further caution or security must be given, that he will either appear in person at the time of pronouncing sentence, or that his surety, in case of non-appearance, shall be bound to pay whatever the sentence exacts, if no appeal be interposed.*

De procuratore rei absentis.

§ V. Si verò reus præstò ex quâcunque causâ non fuerit, et alius velit defensionem ejus subire, nullâ differentiâ inter actiones in rem vel personales introducendâ, potest hoc facere; ita tamen ut satisdationem *judicatum solvi* pro litis æstimatione præstet. Nemo enim

§ 5. *When a defendant does not put in an appearance, then any other person, who is willing, may take upon himself the defence for him, and this may be done either in a real or personal action without distinction, if the caution* judicatum solvi *be entered into for the payment of the es-*

secundùm veterem regulam (ut jam dictum est) alienæ rei sinè satisdatione defensor idoneus intelligitur.

timation of the suit; for no man, according to the ancient rule already mentioned, can be said to defend the cause of another legally, unless security be given.

Unde hæc forma discenda.

§ VI. Quæ omnia apertius et perfectius quotidiano judiciorum usu in ipsis rerum documentis apparent.

§ 6. *But such formalities may be more perfectly learned, from the usage and practice of courts.*

Ubi hæc forma observanda.

§ VII. Quam formam non solùm in hac regiâ urbe, sed etiam omnibùs nostris provinciis, (etsi propter imperitiam fortè aliter celebratur,) obtinere censemus; cum necesse sit, omnes provincias caput omnium nostrarum civitatum, id est, hanc regiam urbem, ejusque observantiam, sequi.

§ 7. *We have judged it expedient, that these forms shall prevail, not only in* Constantinople, *but also in all our other provinces, (although through ignorance they may have practised differently); for it is necessary, that all the provinces should be guided by the example of the capitol of our dominions, and follow the practice of our royal city.*

TITULUS DUODECIMUS.

DE PERPETUIS ET TEMPORALIBUS ACTIONIBUS, ET QUÆ AD HÆREDES ET IN HÆREDES TRANSEUNT.

C. iv. T. 11.

De perpetuis et temporalibus actionibus.

HOC loco admonendi sumus, eas quidem actiones, quæ ex lege, senatusve consulto, sivè ex sacris constitutionibus, proficiscuntur, perpe-

All those actions, which took their rise from the law, the decrees of the senate, or the constitutions, were anciently considered as always in

tuo splere antiquitùs competere, donec sacræ constitutiones tam in rem, quam in personam, actionibus certos fines dederunt: eas vero, quæ ex propriâ prætoris jurisdictione pendent, plerùmque intra annum vivere; nam et ipsius prætoris intra annum erat imperium. Aliquando tamen et in perpetuum extenduntur, id est, usque ad finem constitutionibus introductum; quales sunt eæ, quas bonorum possessori, cæterisquæ, qui hæredis loco sunt, accommodat. Furti quoque manifesti actio, quamvis ex ipsius prætoris jurisdictione proficiscatur, tamen perpetuò datur; absurdum enim esse existimavit, anno eam terminari.

force: but the later emperors have by their ordinances fixed certain limits both to real and personal actions. Actions, given by virtue of the prætor's authority, are generally limited to one year; for such is the duration of his office: but sometimes the prætorian actions are made perpetual; that is they are extended to the limits introduced by the constitutions: such are those actions, which the prætor gives to the possessors of goods, and to others, who hold the place of heirs. The action of manifest theft is also perpetual, although it proceed from the mere authority of the prætor; for it was thought absurd, to limit this action to a year.

De actionibus, quæ in hæredes transeunt vel non.

§ I. Non autem omnes actiones, quæ in aliquem aut ipso jure competunt, aut à prætore dantur, et in hæredem æquè competunt, aut dari solent. Est enim certissima juris regula, ex maleficiis pœnales actiones in hæredem rei non competere; veluti furti, vi bonorum raptorum, injuriarum, damni injuriæ: sed hæredibus hujusmodi actiones competunt, nec denegantur; exceptâ injuriarum actione, et si qua alia similis inveniatur. Aliquando tamen, etiam ex contractu actio contra hæredem non competit; veluti cum testator dolosè versatus sit, et ad hæredem ejus nihil ex eo dolo pervenit: pœnales autem actiones, quas supra diximus, si ab ipsis principalibus personis fuerint con-

§ 1. *Not all actions in general, which either the law, or the prætor, allows also against a man, will be also allowed against his heirs: for it is a sure rule of law, that penal actions, arising from mal-feasance, will not lie against the heir of an offender; such as theft, rapine injury, or damage injuriously done: but these actions will pass to heirs, and are never denied, but in an action of injury, and in other cases of a similar nature. Sometimes even an action of contract will not lie against an heir; as when a testator acts fraudulently, and nothing comes to the possession of the heir by reason of the fraud: but, if the penal actions, of which we have already spoken, are once contested by the prin-*

testatæ, et hæredibus dantur et contra hæredes transeunt.

cipal parties concerned, they will afterwards pass both to, and against, the heirs of such parties.

Si, pendente judicio, reus actori satisfecerit.

§ II. Superest, ut admoneamus, quod, si ante rem judicatam is, cum quo actum est, satisfaciat actori, officio judicis convenit eum absolvere; licet in eâ causâ fuisset judicii accipiendi tempore, ut damnari deberet; et hoc est, quod antea vulgo dicebatur, omnia judicia absolutoria esse.

§ 2. *Lastly it is the duty of the judge to dismiss the defendant, if before sentence he should fully satisfy the plaintiff, although pending the suit, his cause seemed so bad, that he deserved to be condemned; and upon this account it was anciently a common saying, that all actions were dismissible.*

TITULUS DECIMUS-TERTIUS.

DE EXCEPTIONIBUS.

D. xliv. T. 1. C. viii. T. 36.

Continuatio. Ratio exceptionum.

SEQUITUR, ut de exceptionibus dispiciamus. Comparatæ autem sunt exceptiones defendendorum eorum gratiâ, cum quibus agitur; sæpè enim accidit, ut licet ipsa persecutio, quâ actor experitur, justa sit, tamen iniqua sit adversus eum, cum quo agitur.

It follows, that we should treat of exceptions. Exceptions have been introduced into causes for the defence of the party cited; for it often happens, that a suit, which in itself is just, may yet become unjust, when commenced against a wrong person.

De exceptione, quod metus causâ, de dolo, in factum.

§ I. Verbi gratiâ, si metu coactus, aut dolo inductus, aut errore lapsus, stipulanti Titio promisisti, quod non debueras promittere, palàm est, jure civili te obligatum esse, et actio, quâ intenditur, dare te oportere, efficax est; sed iniquum

§ 1. *If you for example compelled by fear, or induced by fraud or mistake, make an imprudent promise to* Titius, *upon stipulation; yet it is evident, you are bound by the civil law, and* Titius *may have an efficacious action: but it may be unjust, that a*

est, te condemnari: ideòque datur tibi exceptio, quod metus causâ, aut doli mali, aut in factum, composita ad impugnandam actionem.

condemnation should follow, and therefore you are permitted to plead exceptive matter calculated to defeat the action, by setting forth, that the promise was extorted by fear or fraud, or otherwise by alledging the peculiar circumstances of the case; (and these are called exceptions in factum compositæ; *i. e. exceptions on the fact.)*

De non numeratâ pecuniâ.

§ II. Idem juris est, si quis quasi credendi causâ pecuniam à te stipulatus fuerit, neque numeraverit. Nam, eam pecuniam à te petere posse eum, certum est; dare enim te oportet, cum ex stipulatione tenearis. Sed, quia iniquum est, eo nomine te condemnari, placet, exceptione pecuniæ non numeratæ, te defendi debere; cujus tempora nos (secundùm quod jam superioribus libris scriptum est) constitutione nostrâ coarctavimus.

§ 2. *So is the law in case any one should obtain your promise to repay money that you never received. It is certain, he may sue you for the money, for you are bound by the stipulation. But as it would be unjust, that you should be condemned upon that account, you are allowed to plead the exception* pecuniæ non numeratæ, *of money not paid. But by our express constitution we have shortened the time allowed for bringing this exception, as we have already observed in the former book.*

De pacto.

§ III. Præterea debitor, si pactus fuerit cum creditore, ne à se pecunia peteretur, nihilominus obligatus manet; quia pacto convento obligationes non omnino dissolvuntur; quâ de causâ efficax est adversus eum actio, quam actor intendit, *si paret, eum dare oportere:* sed, quia iniquum est, contra pactionem eum condemnari, defenditur per exceptionem pacti conventi.

§ 3. *Moreover, although a creditor agree not to sue his debtor, yet the debtor remains bound; for obligations are not to be wholly dissolved by a mere agreement: and therefore an action in this form,* si paret, eum dare oportere, *would be efficacious against the debtor; but, as it would be unjust, that the debtor should be condemned to make payment, notwithstanding the agreement, he is therefore permitted to defend himself by an exception of contract.*

De jurejurando.

§ IV. Æque, si debitor creditore deferente juraverit, nihil se dare oportere, adhuc obligatus permanet; sed, quia iniquum est de perjurio queri, defenditur per exceptionem jurisjurandi. In iis quoque actionibus, quibus, in rem agitur, æquè necessariæ sunt exceptiones; veluti si petitore deferente possessor juraverit, eam rem suam esse, et nihilo minus petitor eandem rem vindicet: licèt enim verum sit, quod intendit, id est, ejus esse; iniquum tamen est, possessorem condemnari.

§ 4. *If an oath be administered to a debtor at the instance of his creditor, and he swears, that nothing is due, yet he still remains bound: but, as it would not be right, that the plaintiff should afterwards complain of perjury, the debtor may defend himself by alledging his own oath by way of exception. Exceptions are equally necessary in real actions; as when the party in possession at the request of the demandant, swears, that the thing in dispute is his own, and the demandant will nevertheless endeavour to recover it: for although the demandant's allegation be true; viz. that the thing claimed appertains to him, yet it is unjust, that the possessor should be condemned.*

De re judicatâ.

§ V. Item, si judicio tecum actum fuerit, sivè in rem, sivè in personam, nihilominus obligatio durat; et ideò ipso jure de eâdem re postea adversus te agi potest: sed debes per exceptionem rei judicatæ adjuvari.

§ 5 *If you have been sued either upon a real or personal action, the obligation nevertheless remains; and therefore, in strict law, you may again be sued upon the same account; but, you may plead the former trial in bar, and be aided by the exception* Rei judicatæ.

De cæteris exceptionibus.

§ VI. Hæc, exempli causâ, retulisse sufficiat; alioqui, quam ex multis variisque causis exceptiones necessariæ sint, ex latioribus digestorum seu pandectarum libris intelligi potest.

§ 6. *It may suffice to have given these instances of exceptions in general; but in how many and in what various cases they are necessary, may be learned from the larger books of the digests, or pandects.*

Divisio prima.

§ VII. Quarum quædam ex legibus, vel iis, quæ legis vicem obtinent, vel ex ipsius prætoris jurisdictione, substantiam capiunt.

§ 7. *Some exceptions proceed from the laws themselves, or from regulations that hold the place of laws; others from the authority of the prætor.*

Divisio secunda.

§ VIII. Appellantur autem exceptiones aliæ perpetuæ et peremptoriæ, aliæ temporales et dilatoriæ.

§ 8. *Some exceptions are called perpetual and peremptory; others are temporary and dilatory.*

De peremptoriis.

§ IX. Perpetuæ et peremptoriæ sunt, quæ semper agentibus obstant, et semper rem, de quâ agitur, perimunt; qualis est exceptio doli mali, et quod metûs causâ factum est, et pacti conventi, cum ita convenerit, ne omnino pecunia peteretur.

§ 9. *The perpetual and peremptory are those, which always obstruct the plaintiff, and destroy the force of the action—of this sort is the exception of fraud, of fear, and of compact, when it is agreed that the money shall not be sued for.*

De dilatoriis.

§ X. Temporales atque dilatoriæ sunt, quæ ad tempus nocent, et temporis dilationem tribuunt; qualis est pacti conventi, cum ita convenerit, ne intra certum tempus ageretur, veluti intra quinquennium: nam, finito eo tempore, non impeditur actor rem exequi. Ergo ii, quibus intra certum tempus agere volentibus objicitur exceptio aut pacti conventi, aut alia similis, differre debent actionem, et post tempus agere; ideò enim dilatoriæ istæ exceptiones appellantur. Alioqui, si intra tempus egerint objectaque sit exceptio, neque eo judicio quicquam consequebantur

§ 10. *Temporary and dilatory exceptions are those, which operate for a time, and create delay; such is an agreement not to sue within a certain time, as five years; but at the expiration of that time the creditor may proceed: and therefore those, against whom this exception* pacti conventi *or any other similar can be objected, must delay their action, and sue when the time is expired; hence, these exceptions are termed dilatory: and formerly, if the plaintiff had sued before the time, and exception was taken, it not only barred the claim for that time, but prevented the plaintiff from proceed-*

propter exceptionem, neque post tempus olim agere poterant, cum temerè rem in judicium deducebant et consumebant; quâ ratione rem amittebant. Hodie autem non ita strictè hoc procedere volumus; sed eum, qui ante tempus pactionis vel obligationis litem inferre ausus sit, Zenonianæ constitutioni subjacere censemus, quam sacratissimus legislator de iis, qui tempore plus petierint, protulit: et inducias, quas ipse actor sponte indulserit, vel quas natura actionis continet, si contempserit, in duplum habeant ii, qui talem injuriam passi sunt; et, post eas finitas, non aliter litem suscipiant, nisi omnes expensas litis antea acceperint: ut actores, tali pœnâ perterriti, tempora litium doceantur observare.

ing at the expiration of the time agreed on; for he was reputed to have lost his right, by having rashly commenced suit. But we have been willing to mitigate this rigor, so that whoever presumes to commence a suit before the time limited by agreement, shall be subject to the constitution of Zeno *concerning those, who demand more than their due; and, if a plaintiff break in upon the time, which he has spontaneously granted, or contemns the limits which the nature of some actions allow, the defendant thus injured, becomes intitled to twice the time before allowed, and, even when that is expired, cannot be obliged to enter an appearance, until he has been reimbursed the whole of his expenses; and this we have ordained* in terrorem, *that plaintiffs may be taught to observe the proper time of commencing their suits.*

De dilatoriis ex personâ.

§ XI. Præterea etiam ex personâ sunt dilatoriæ exceptiones, quales sunt procuratoriæ; veluti si per militem, aut mulierem, agere quis velit: nam militibus nec pro patre, vel matre, vel uxore, nec ex sacro rescripto, procuratorio nomine experiri conceditur; suis vero negotiis superesse sinè offensâ militaris disciplinæ possunt. Eas verò exceptiones, quæ olim procuratoribus propter infamiam vel dantis, vel ipsius procuratoris, opponebantur, cum in judiciis frequentari nullo modo perspeximus, conqui-

§ 11. *Dilatory exceptions may also be personal, as those against proctors, where a suitor employs a soldier, or a woman to act for him; for soldiers are not permitted to act as proctors even in behalf of a father, a mother, or a wife, although they obtain the sanction of an imperial rescript; but they may superintend their own affairs, without offending against military discipline. But we have put a stop to the exceptions of infamy, which were formerly made, both against proctors and their constituents, having observed them to be*

escere sancimus; ne, dum de his altercatur, ipsius negotii disceptatio proteletur.

little practised, and fearing, lest by such altercations, an enquiry into the merits of causes should be retarded.

TITULUS DECIMUS-QUARTUS.

DE REPLICATIONIBUS.

De replicatione.

INTERDUM evenit, ut exceptio, quæ primâ facie justa videtur, tamen iniquè noceat: quod cum accidit, aliâ allegatione opus est, adjuvandi actoris gratiâ; quæ replicatio vocatur, quia per eam replicatur atque resolvitur jus exceptionis; veluti cum pactus est aliquis cum debitore suo, ne ab eo pecuniam petat, deinde postea in contrarium pacti sunt, id est, ut creditori petere liceat: si creditor agat, et excipiat debitor, ut ita demum condemnetur, si non convenerit, ne eam pecuniam creditor petat, nocet ei exceptio; convenit enim ita: namque nihilominus hoc verum manet, licèt postea in contrarium pacti sint. Sed, quia iniquum est, creditorem excludi, replicatio ei dabitur ex posteriore pacto convento.

Sometimes an exception, which appears at first view to be valid, is not so: and when this happens, an additional allegation is necessary in aid of the plaintiff, called a replication, because the force of the exception is replicated, *that is, unfolded, and destroyed by it; as if a creditor should covenant with his debtor not to sue him, and the contrary should afterwards be agreed between them, in consequence of which the creditor brings an action, to which the debtor excepts, alledging the agreement of his creditor not to sue: in this case the exception would be of weight, as such an agreement was actually made, although another was made afterwards to a contrary effect: but, as it would be unjust, that a creditor should be thus concluded, he is allowed to plead the subsequent compact, by way of replication.*

De duplicatione.

§ I. Rursus interdum evenit, ut replicatio, quæ primâ facie justa est, inique noceat; quod cum accidit, aliâ allegatione opus est, adjuvandi rei gratiâ; quæ duplicatio vocatur.

§ 1. *It also sometimes happens, that a replication at first appears conclusive, though it be not so; in this case another allegation, called a duplication, may be offered by the defendant. (Rejoinder.)*

De triplicatione.

§ II. Et, si rursus ea primâ facie justa videatur, sed propter aliquam causam actori iniquè noceat, rursus aliâ allegatione opus est, qua actor adjuvetur; quæ dicitur triplicatio.

§ 2. *And when a duplication carries with it an appearance of justice, but is wrongfully urged against the plaintiff, he may also, in his turn, put in another allegation, which is termed a triplication. (Surrejoinder.)*

De cæteris exceptionibus.

§ III. Quarum omnium exceptionum usum interdùm ulterius, quam diximus, varietas negotiorum introducit; quas omnes apertius ex digestorum latiore volumine facile est cognoscere.

§ 3. *But in the great variety of business, the use of these exceptions is extended still farther, than we have mentioned; of which a fuller knowledge may be obtained from the larger volumes of the digests. (Rebutter, Surrebutter.)*

Quæ exceptiones fidejussoribus prosunt vel non.

§ IV. Exceptiones autem, quibus debitor defenditur, plerùmque accommodari solent etiam fidejussoribus ejus; et rectè: quia, quod ab iis petitur, id ab ipso debitore peti videtur; quia mandati judicio redditurus est eis, quod ei pro eo solverint. Quâ ratione, et si de non petendâ pecunia pactus quis cum eo fuerit, placuit, perindè succurrendum esse per exceptionem pacti conventi illis quoque, qui pro eo obligati sunt, ac si etiam cum ipsis pactus esset, ne ab eis pecunia

§ 4. *The exceptions, by which a debtor may defend himself, are generally and properly allowed to be used by his bondsmen; for a demand made upon them, is, as it were, a demand upon the debtor himself, who is compellable by an action of mandate to pay over to his sureties whatever they have been obliged to pay upon his account: and therefore, if a creditor hath covenanted with his debtor not to sue him, the bondsmen may be aided by an exception of compact, just as if the promise had been*

peteretur. Sanè quædam exceptiones non solent his accommodari. Ecce enim debitor, si bonis suis cesserit, et cum eo creditor experiatur, defenditur per exceptionem, *si bonis cesserit:* sed hæc exceptio fidejussoribus non datur; ideò scilicet, quia, qui alios pro debitore obligat, hoc maximè prospicit, ut, cum facultatibus lapsus fuerit debitor, possit ab iis, quos pro eo obligavit, suum consequi.

made to them. But some exceptions can not be used in behalf of sureties; for although, when a debtor hath made cession of his goods, he may defend himself by pleading a cessio bonorum, *as an exception to a suit brought by a creditor; the same exception cannot aid the bondsmen; for whoever demands sureties always means to recover his debt from them, in case of failure in the principal debtor.*

TITULUS DECIMUS-QUINTUS.

DE INTERDICTIS.

D. xliii. T. 1. C. viii. T. 1.

Continuatio et definitio.

SEQUITUR, ut dispiciamus de interdictis, seu actionibus, quæ pro his exercentur. Erant autem interdicta formæ atque conceptiones verborum, quibus prætor aut jubebat aliquid aut fieri prohibebat; quod tunc maximè fiebat, cum de possessione aut quasi possessione inter aliquos contendebatur.

We are now led to treat of interdicts, or of those actions, which supply their place. Interdicts, were certain forms of words, by which the prætor either commanded or prohibited something to be done; and were chiefly used, when any contention arose concerning possession, or quasi-*possession.*

Divisio prima.

§ I. Summa autem divisio interdictorum hæc est, quod aut prohibitoria sunt, aut restitutoria, aut exhibitoria. Prohibitoria sunt, quibus prætor vetat aliquid fieri; veluti; vim sinè vitio possidenti, vel mortuum inferenti, quo ei jus erat

§ 1. *The first division of them is into prohibitory, restoratory, and exhibitory interdicts. Prohibitory are those, by which the prætor forbids something to be done, as when he forbids force to be used against a lawful possessor; or against a per-*

inferendi; vel in sacro loco ædificari, vel in flumine publico ripâve ejus aliquid fieri, quo pejus navigetur. Restitutoria sunt, quibus restitui aliquid jubet; veluti bonorum possessori possessionem eorum, quæ quis pro hærede, aut pro possessore, possidet ex eâ hæreditate; aut cum jubet, ei, qui vi de possessione dejectus sit, restitui possessionem. Exhibitoria sunt, per quæ jubet exhiberi; veluti eum, cujus de libertate agitur; aut libertum, cui patronus operas indicere velit; aut parenti liberos, qui in potestate ejus sunt. Sunt tamen, qui putent, *interdicta* ea propriè vocari, quæ prohibitoria sunt; quia interdicere sit denuntiare et prohibere; restitutoria autem et exhibitoria propriè *decreta* vocari: sed tamen obtinuit, omnia interdicta appellari; quia inter duos dicuntur.

son who is burying another, where he hath a right; or when he forbids an edifice to be raised in a sacred place, or hinders a work from being erected in a public river, or on the banks which may render it less navigable. The restoratory, direct something to be restored, as the possession of goods to the universal successor, who has been kept out of possession by one, who hath no right; or when the prætor commands possession to be restored to him, who hath been forcibly ejected. And the exhibitory interdicts are those, by which the prætor commands some exhibit to be made, as of a slave, for example, concerning whose liberty a cause is depending; or of a freed-man, from whom a patron would exact the service due to him; or of children to their parent, under whose power they are. Some nevertheless imagine, that interdicts can with propriety be only prohibitory, because the word interdicere *signifies to* denounce *and* prohibit;—*and that the restoratory and exhibitory interdicts might more properly be called decrees: yet by usage they are all termed interdicts, because they are pronounced between two,* [inter duos dicuntur,] *the demandant and the possessor.*

Divisio secunda.

§ II. Sequens divisio interdictorum hæc est; quod quædam adipiscendæ possessionis causâ comparata sunt, quædam retinendæ, quædam recuperandæ.

§ 2. The second division of interdicts is into those, which are given for the acquisition, the retention, or the recovery of a possession.

De interdictis adipiscendæ.

§ III. Adipiscendæ possessionis causâ interdictum accommodatur bonorum possessori, quod appellatur, *Quorum bonorum*; ejusque vis et potestas hæc est, ut, quod ex iis bonis quisque, quorum possessio alicui data est, pro hærede aut pro possessore possideat, id ei, cui bonorum possessio data est, restituere debeat. Pro hærede autem possidere videtur, qui putat se hæredem esse. Pro possessore is possidet, qui nullo jure rem hæreditariam, vel etiam totam hæreditatem, sciens ad se non pertinere, possidet. Ideò autem adipiscendæ possessionis vocatur interdictum, quia ei tantum utile est, qui nunc primùm conatur adipisci possessionem; itaque, si quis adeptus possessionem amiserit eam, hoc interdictum ei inutile est. Interdictum quoque Salvianum adipiscendæ possessionis causâ comparatum est; eoque utitur dominus fundi de rebus coloni, quas is pro mercedibus fundi pignori futuras pepigisset.

§ 3. *An interdict for obtaining possession called* Quorum Bonorum, *is given to him, to whom the prætor commits possession of the goods of a deceased person; and it obliges all persons, who retain goods as heirs or possessors, to restore such goods to those, to whom the possession hath been committed by the magistrate: and note, that he is reputed to possess as heir, who conceives himself so to be; and he is deemed the possessor, who without authority retains a part or the whole, of an inheritance, knowing the possession does not belong to him. An interdict of acquisition is so called, because, it is useful to him only, who* first *endeavours to acquire the possession; and therefore it would be useless to one, who had acquired a possession, and afterwards lost it. The* Salvian *interdict, is also appointed for the acquisition of possession; and is used by proprietors of farms, against goods which their tenants have pledged, for the payment of rent.*

De interdictis retinendæ.

§ IV. Retinendæ possessionis causâ comparata sunt interdicta, *Uti possidetis, et utrubi*; cum ab utrâque parte de proprietate alicujus rei controversia sit, et ante quæratur, uter ex litigatoribus possideat, et uter petere debeat: namque, nisi ante exploratum fuerit, utrius eorum possessio sit, non potest petitoria acto instituti; quia et civilis

§ 4. *The interdicts* Uti possidetis *and* Utrubi *have been introduced for the purpose of retaining possession; for in a controversy, concerning property, it is necessary to inquire, which of the parties is in possession, and who ought to be plaintiff; for, until the possession be ascertained, an action of demand cannot be instituted; and both civil and*

ea naturalis ratio facit, ut alius possideat, et alius a possidente petat. Et, quia longè commodius est et potius possidere, quam petere, ideò plerùmque, et ferè semper, ingens existit contentio de ipsâ possessione. Commodum autem possidenti in eo est, quod, etiam si ejus res non sit, qui possidet, si modo actor non potuerit suam esse probare, remanet in suo loco possessio; propter quam causam, cum obscura sunt utriusque jura, contra petitorem judicari solet. Sed interdicto quidem *Uti possidetis* de fundi vel ædium possessione contenditur: *Utrubi* verò interdicto de rerum mobilium possessione, quorum vis ac potestas plurimam inter se differentiam apud veteres habebat: nam *Uti possidetis* interdicto is vincebat, qui interdicti tempore possidebat; si modo nec vi, nec clàm, nec precariò, nactus fuerat ab adversario possessionem: etiamsi alium vi expulerat, aut clàm arripuerat alienam possessionem, aut precariò rogaverat aliquem, ut sibi possidere liceret. *Utrubi* verò interdicto is vincebat, qui majore parte anni nec vi, nec clàm, nec precariò, ab adversario possidebat. Hodie tamen aliter observatur; nam utriusque interdicti potestas (quantum ad possessionem pertinet) exæquata est, ut ille vincat et in re soli, et in re mobili, qui possessionem nec vi, nec

natural law teach us, that, when one party is in possession, the other must be claimant: but as it is more advantageous to be possessor, than demandant, there is generally great contention for the possession; for although the possessor is not in reality the true proprietor, yet the possession will still remain in him, if the plaintiff does not prove the thing in litigation to be his own: and therefore, when the rights of parties are not clear, the sentence is always against the demandant. By the interdict Uti possidetis, *the possession of a farm or house is contended for; and, by the interdict* Utrubi, *the possession of things moveable is disputed. These interdicts anciently differed much in their force and effects; for, by* Uti possidetis, *the party in possession at the bringing of the interdict, prevailed, if he had not obtained the possession from his adversary, by force, clandestinely, or precariously: but it was not material in what manner the possessor had obtained the possession from any other person: and, by the interdict* Utrubi, *that party prevailed who had been in possession for the greatest part of the year preceding the contest, if he had not acquired that possession clandestinely, precariously, or by force. But the present practice is otherwise; for the force of either interdict, as to pos-*

clàm nec precariò, ab adversario, litis contestatæ tempore, detinet.

session is now made equal; so that in any cause, either concerning things moveable or immoveable, that party prevails, who was in possession at the commencement of the suit, if it be not shewn that he gained such possession by force, by clandestine means, or precariously: (that is under the adversary himself.)

De retinendâ et acquirendâ possessione.

§ V. Possidere autem videtur quisque, non solùm si ipse possideat, sed et si ejus nomine aliquis in possessione sit, licèt is ejus juri subjectus non sit; qualis est colonus et inquilinus. Per eos quoque, apud quos deposuerit quis, aut quibus commodaverit, ipse possidere videtur; et hoc est, quod dicitur, retinere possessionem posse aliquem per quemlibet, quis ejus nomine sit in possessione. Quinetiam animo quoque solo retineri possessionem placet; id est, ut, quamvis neque ipse sit in possessione neque ejus nomine alius, tamen si non relinquendæ possessionis animo, sed postea reversurus indè decesserit, retinere possessionem videatur. Adipisci vero possessionem per quos aliquis potest, secundo libro exposuimus; nec ulla dubitatio est, quin animo solo adipisci possessionem nemo possit.

§ 5. *A man is considered in possession, not only when he is himself so, but when any other person, although not under his power, holds possession in his name; as a farmer, or a tenant. A man may also possess, by means of those, to whom he hath committed the thing in litigation, either as a deposit or a loan; and this is meant when it is said that a man may retain possession by means of another, who possesses in his name. It is moreover held, that a possession may be* retained, *by the mere intention only; for, although a man is neither in possession himself, nor any other for him, but has quitted the possession of certain lands with an intent to return to them again, he shall nevertheless be deemed to continue in possession. We have already explained, in the second book, by what persons a man may acquire possession; and, although it may be* retained *by intention only, yet this is not sufficient for the* acquisition *of possession.*

De interdicto recuperandæ, et affinibus remediis.

§ VI. Recuperandæ possessionis causâ solet interdici, si quis ex possessione fundi vel ædium vi dejectus fuerit; nam ei proponitur interdictum *Unde vi*, per quod is, qui dejecet, cogitur ei restituere possessionem, licèt is ab eo, qui vi dejecit, vi, clàm, vel precariò, possideat. Sed ex constitutionibus sacris, (ut supra diximus,) si quis rem per vim occupaverit, siquidem in bonis ejus est, dominio ejus privatur; si aliena, post ejus restitutionem, etiam æstimationem rei dare vim passo compellitur. Qui autem aliquem de possessione per vim dejecerit, tenetur lege Juliâ de vi privatâ, aut de vi publicâ. Sed de vi privatâ, si sinè armis vim fecerit; sin autem armis eum de possessione vi expulerit, de vi publicâ tenetur. Armorum autem appellatione non solùm scuta et gladios et galeas, sed et fustes et lapides, significari intelligimus.

§ 6. *The interdict for recovery of possession, is generally employed, when any one hath been forcibly ousted from the possession of his house or estate; who then becomes entitled to the interdict* Unde vi, *by which the intruder is compelled to restore him to possession, although he, who had been thus forcibly ousted, was himself in possession by clandestine means, by force, or precariously. But, as we have said before, the imperial constitutions provide, that, whoever seizes a thing by force, if it be his own, he shall lose his property in it; and, if it belong to another, he shall be compelled not only to make restitution, but to pay the full value to the party, who suffered the force. But whoever ousts another of possession by force, is likewise subject to the law* Juliâ de vi privatâ, *or* de vi publicâ: *if the seizing or intrusion was effected without weapons, then the offender is only liable to the law* de vi privatâ; *but, if by an armed force, he is then subject to the law* de vi publicâ. *We comprehend not only shields swords, and helmets under the term* arms, *but also clubs and stones.*

Divisio tertia.

§ VII. Tertia divisio interdictorum est, quod aut simplicia sunt, aut duplicia. Simplicia sunt, veluti in quibus alter actor, alter reus est; qualia sunt omnia restitutoria, aut exhibitoria; nam actor is est, qui

§ 7. *The third division of interdicts is into simple and double; the simple are those, in which there is both a plaintiff and a defendant; and of this sort are all restoratory and exhibitory interdicts: for the plain-*

desiderit aut exhiberi aut restitui; reus autem is est, à quo desideratur, ut restituat, aut exhibeat. Prohibitoriorum autem interdictorum alia simplicia sunt, alia duplicia. Simplicia sunt, veluti cum prætor prohibet in loco sacro, vel in flumine publico, ripâve ejus, aliquid fieri: nam actor est, qui desiderat, ne quid fiat; reus est, qui aliquid facere conatur. Duplicia sunt, veluti *Uti possidetis* interdictum, et *Utrubi*. Ideò autem duplicia vocantur, quia par utriusque litigatoris in his conditio est; nec quisquam præcipuè reus vel actor intelligitur, sed unusquisque tam rei, quam actoris partes sustinet.

tiff, is he, who requires something to be exhibited or restored; and the defendant is he, from whom the exhibition or restitution is required. But of the prohibitory interdicts some are simple, some double; simple, when the prætor forbids something to be done in a sacred place, on a public river, or upon the banks of it; and the demandant actor or plaintiff is he, who desires, that some act should not be done, and the defendant is he, who endeavours to do it. The interdicts Uti possidetis *and* Utrubi *are instances of the double interdicts; double, because in these the condition of either litigant is equal, the one not being understood to be more particularly the plaintiff or the defendant, than the other: inasmuch as each sustains the part of both.*

De ordine et vetere exitu.

§ VIII. De ordine et vetere exitu interdictorum supervacuum est hodie dicere; nam quoties extra ordinem jus dicitur, (qualia sunt hodie omnia judicia,) non est necesse reddi interdictum: sed perindè judicatur sinè interdictis, ac si utilis actio ex causâ interdicti reddita fuisset.

§ 8. *It would be superfluous at this day to speak of the order, and ancient effect of interdicts; for when judgments are extraordinary, (as all judgments now are) an interdict becomes unnecessary. Judgments are therefore now delivered without interdicts, in like manner, as if a beneficial action were given in consequence of an interdict.*

TITULUS DECIMUS-SEXTUS.

DE PŒNA TEMERE LITIGANTIUM.

De pœnis in genere.

NUNC admonendi sumus, magnam curam egisse eos, qui jura sustinebant, ne facile homines ad litigandum procederent; quod et nobis studio est. Idque eo maximè fieri potest, quod temeritas tam agentium, quam eorum, cum quibus agitur, modo pecuniariâ pœnâ, modo jurisjurandi religione, modo infamiæ metu coerceatur.

Our magistrates have ever been careful to hinder men from engaging inconsiderately in law suits; and it hath been our study also. The better to prevent such suits, the rashness both of plaintiffs and defendants hath been properly restrained, by pecuniary punishments, the coercion of an oath, and the fear of infamy.

De jurejurando et pœnâ pecuniariâ.

§ 1. Ecse enim jusjurandum omnibus, qui conveniuntur, ex constitutione nostrâ defertur; nam reus non aliter suis allegationibus utitur, nisi prius juraverit, quod, putans se bonâ instantiâ uti, ad contradicendum pervenit. At, adversus inficiantes, ex quibusdam causis dupli actio constituitur; veluti si damni injuriæ, aut legatorum locis venerabilibus relictorum, nomine agatur. Statim autem ab initio pluris quam simpli est actio; veluti furti manifesti, quadrupli; nec manifesti, dupli: nam ex his, et aliis quibusdam causis, sivè quis neget, sivè fateatur, pluris quam simpli est actio. Item actoris quoque calumnia coercetur; nam etiam actor pro calumniâ jurare cogitur ex nostrâ constitutione, quod non calumniandi animo litem movisset, sed existimando, se bonam causam ha-

§ 1. *By virtue of one of our constitutions, an oath must be administered to every man against whom an action is brought; for a defendant may not plead, until he hath first sworn, that he proceeds upon a firm belief that his cause is good. But actions lie, in particular cases, for double and triple value against those who deny the cause of action; as when a suit is commenced on account of injurious damage, or for a legacy left to a sacred place, as a church, hospital,* &c. *There are also actions, upon which more than the simple value is recoverable at the time of their commencement; as upon an action of theft* manifest, *which is for fourfold the value; an action of theft* not manifest, *for double the value; because in these, and some other cases, the action is at first given for more than the simple value, whe-*

bere. Utriusque etiam partis advocati jusjurandum subeunt, quod aliâ nostrâ constitutione comprehensum est. Hæc autem omnia pro veteri calumniæ actione introducta sunt, quæ in desuetudinem abiit; quia in partem decimam litis actores multabat, quod nusquam factum esse invenimus: sed pro his introductum est et præfatum jusjurandum, et ut improbus litigator et damnum et impensas litis inferre adversario suo cogatur,

ther the defendant denies or confesses the charge brought against him. The calumny of the plaintiff is also under restraint; for he too is compelled by our constitution to swear, that he did not commence the suit with an intention to calumniate; but upon thorough confidence that he had a good cause: and, the advocates on both sides are likewise compellable to take a similar oath, the substance of which is set forth in another of our constitutions. This practice hath been introduced in the place of the ancient action of calumny, which compelled the plaintiff to pay the tenth part of his demand as a punishment, but is now disused; and, instead of it, we have introduced the before-mentioned oath, and have ordained, that every rash litigant, who hath failed in his proof, shall be compelled to pay his adversary the damages and costs of suit.

De infamiâ.

§ II. Ex quibusdam judiciis damnati ignominiosi fiunt; veluti furti, vi bonorum raptorum injuriarum, de dolo; item tutelæ, mandati, depositi, directis, non contrariis actionibus: item pro socio, quæ ab utrâque parte directâ est; et ob id quilibet ex sociis, eo judicio damnatus, ignominiâ notatur. Sed furti quidem, aut vi bonorum raptorum, aut injuriarum, aut de dolo, non solùm damnati notantur ignominiâ, sed et pacti; et rectè: plurimum enim interest, utrùm ex de-

§ 2. *In some cases the parties condemned become infamous, as in actions of theft, rapine, injury, or fraud. Also, in an action of tutelage, mandate, or deposit, if it be a* direct, *and not a contrary, action. An action of partnership has also the same effect; for it is direct in regard to all the partners; and therefore any one of them, who is condemned in such action, is branded with infamy. Not only those, who have been condemned in an action of theft, rapine, injury, or fraud,*

licto aliquis, an ex contractu, debitor sit.

are rendered infamous; but those also, who have bargained to prevent a criminal prosecution; and this is a right; for there is a wide difference between a debtor, on account of a debtor upon contract.

De in jus vocando.

§ III. Omnium autem actionum instituendarum principium ab eâ parte edicti proficiscitur, quâ prætor edicit de in jus vocando. Utique enim in primis adversarius in jus vocandus est; id est, ad eum vocandus, qui jus dicturus sit. Quâ parte prætor parentibus et patronis, item parentibus liberisque patronorum et patronarum, hunc præstat honorem, ut non alitèr liceat liberis libertisque eos in jus vocare, quam si id ab ipso prætore postulaverint et impetraverint. Et, si quis alitèr vocaverit, in eum pœnam solidorum quinquaginta constituit.

§ 3. *All actions take their rise from that part of the prætor's edict, in which he treats* de in jus vocando *of calling parties into court: for the first step in matters of controversy, is to cite the adverse party to appear before the judge, who is to determine the cause. In the same part of the edict, the prætor hath treated parents and patrons, and even the parents and children of patrons and patronesses, with so great respect, that he does not suffer them to be called into judgment by their children or their freedmen, until application hath been first made to him, and leave obtained; and, if any man presume to cite such persons otherwise, he is subject to a penalty of fifty* solidi.

TITULUS DECIMUS-SEPTIMUS.

DE OFFICIO JUDICIS.

De officio judicis in genere.

SUPEREST, ut de officio judicis dispiciamus. Et quidem in primis illud observare debet judex, ne aliter judicet, quam legibus, aut constitutionibus, aut moribus, proditum est.

It remains, that we inquire into the office and duty of a judge: whose first care it ought to be not to determine otherwise, than the laws, the constitutions, or the customs and usages direct.

De judicio noxali.

§ I. Ideòque, si noxali judicio aditus est, observare debet, ut, si condemnandus videtur dominus, ita debeat condemnare: *Publium Mavium Lucio Titio in decem aureos condemno; aut noxam dedere.*

§ 1. *And therefore, if a suit be commenced by a noxal action, the judge ought always to observe the following form of condemnation, if the defendant ought to be condemned:* e. g. I condemn PUBLIUS MÆVIUS to pay LUCIUS TITIUS ten *aurei*, or to deliver up the slave, who did the damage.

De actionibus realibus.

§ II. Et, si in rem actum sit coràm judice, sivè contra petitorem judicaverit, absolvere debet possessorem; sivè contra possessorem, jubere ei debet, ut rem ipsam restituat cum fructibus. Sed si possessor neget, in præsenti se restituere posse, et sinè frustratione videbitur tempus restituendi causâ petere, indulgendum est ei; ut tamen de litis æstimatione cayeat cum fidejussore, si intra tempus, quod ei datum est, non restituerit. Et, si hæreditas petita sit, eadem

§ 2. *When a real action, is brought before a judge, and he pronounces against the demandant, the possessor ought then to be acquitted; if against the possessor, he must be admonished to restore the very thing in dispute, together with all its produce. But, if the possessor should alledge, that he is unable to make immediate restitution, and petition for longer time, without any seeming intention to frustrate the sentence, he is to be indulged; provided he gives security for the full payment*

circa fructùs interveniunt, quæ diximus intervenire de singularum rerum petitione. Illorum autem fructuum quos culpâ suâ possessor non perceperit, sivè illorum, quos perceperit, in utrâque actione eadem ratio penè habetur, si prædo fuerit. Si verò bonæ fidei possessor fuerit, non habetur ratio neque consuptorum, neque non perceptorum. Post inchoatam autem petitionem etiam illorum fructuum ratio habetur, qui culpâ possessoris percepti non sunt, vel percepti consumpti sunt.

of the condemnation and costs of suit, if he should fail to make restitution within the time appointed. And, if an inheritance be sued for, a judge ought to determine in the same manner as to the profits, as he would in a suit for some particular thing only; for, if the defendant appear to have been a possessor malâ fide, *then almost the same reasoning prevails in both actions as to the profits, whether they were taken or neglected by the possessor: but, if the defendant be a possessor* bonâ fide, *then no account is expected, either of produce consumed or not collected before the suit. But all produce must be accounted for from the date of the action, whether used or neglected.*

De actione ad exhibendum.

§ III. Si ad exhibendum actum fuerit, non sufficit, si exhibeat rem is, cum quo actum est; sed opus est, ut etiam rei causam debeat exhibere, id est, ut eam causam habeat actor, quam habiturus esset, si, cum primum ad exhibendum egisset, exhibita res fuisset: ideòque, si inter moras exhibendi, usucapta sit res à possessore, nihilominus condemnabitur. Præterea fructuum medii temporis, id est, ejus, quod post acceptum ad exhibendum judicium, ante rem judicatam, intercesserit, rationem habere debet judex. Quod si neget reus, cum quo ad exhibendum actum est, in præsenti se exhibere posse, et tempus exhibendi causâ

§ 3. *If a man proceed by an action* ad exhibendum, *it is not sufficient, that the defendant should exhibit the thing in question, but he must also be answerable for all profits and emoluments accruing from it; that the plaintiff may be in the same state, as if his property had been restored to him when he first brought his action: and therefore, if the possessor, during his delay to surrender the thing in dispute, shall gain a prescriptive title to it, he shall nevertheless be condemned to restitution. Morever it is the duty of the judge to take an account of the mesne profits accruing between the suit and the sentence. But, when the defendant declares, that he is not able*

petat, idque sinè frustratione postulare videatur, dari ei debet, ut tamen caveat, se restituturum. Quod si neque statim jussu judicis rem exhibeat, neque postea se exhibiturum caveat, condemnandus sit in id, quod actoris intererat, si ab initio res exhibita esset.

instantly to produce the thing adjudged, and prays a farther time, without apparent affectation of delay, time should be allowed, on his giving security for restitution. But, if he neither obey the command of the magistrate by instantly producing the thing adjudged, nor in giving sufficient security for the production of it at a future day, he must be condemned in the full damages, which the plaintiff hath sustained by not having the article delivered to him at the commencement of the suit.

Familiæ erciscundæ.

§ IV. Si familiæ erciscundæ judicio actum sit, singulas res singulis hæredibus adjudicare debet; et, si in alterius personâ prægravare videatur adjudicatio, debet hunc invicèm cohæredi certâ pecuniâ (sicuti jam dictum est) condemnare. Eo quoque nomine cohæredi quisque suo condemnandus est, quod solus fructus hæreditarii fundi perceperit, aut rem hæreditariam corruperit, aut consumpserit. Quæ quidem similiter inter plures quoque quam duos cohæredes subsequuntur.

§ *When a suit is commenced for the partition of an inheritance, the judge must decree to each heir his respective portion; and, if the partition, when made, be more advantageous to the one than to the other, the judge ought as we have before observed, to oblige him, who has the largest part, to make a full recompense in money to his co-heir: it therefore follows, that every co-heir, who hath taken the profits of an inheritance to his sole use, and consumed them, is liable to be compelled to make restitution. And this is the law whether there are two heirs, or many.*

Communi dividundo.

§ V. Eadem interveniunt, etsi communi dividundo de pluribus rebus actum sit. Quod si de unâ re, veluti de fundo; siquidem iste fundus commodè regionibus divi-

§ 5. *The law is the same, when a suit is brought* communi dividundo, *for one particular thing only, it being but a part or parcel of an inheritance, as a field, or any piece*

sionem recipiat, partes ejus singulis adjudicare debet: et, si unius pars prægravare videtur, is invicèm certâ pecuniâ alteri condemnandus est. Quod si commodè dividi non possit, vel si homo fortè aut mulus erit, de quo actum sit, tunc totus uni adjudicandus est, et is invicèm alteri certâ pecuniâ condemnandus est.

of ground, which, if it can be conveniently divided, ought to be adjudged to each claimant in equal portions; and if the share of one be larger than the others, the party having the largest portion, must be condemned to make a recompense in money. But, if the thing sued for be of such a nature, that it cannot be divided, as a slave, or a horse, it must be given entirely to one of the co-partners, who must be ordered to make satisfaction in money to the other.

Finium regundorum.

§ VI. Si finium regundorum actum fuerit, dispicere debet judex, an necessaria sit adjudicatio; quæ sanè uno casu necessaria est, si evidentioribus finibus distingui agros commodius sit, quam olim fuissent distincti: nam tunc necesse est, ex alterius agro partem aliquam alterius agri domino adjudicari; quo casu conveniens est, ut is alteri certâ pecuniâ debeat condemnari. Eo quoque nomine condemnandus est quisque hoc judicio, quod fortè circa fines aliquid malitiosè commisit; verbi gratiâ, quia lapides finales furatus est, vel arbores finales excidit. Contumaciæ quoque nomine quisque eo judicio condem-

§ 6. *When the action* finium regundorum *is brought for the determination of boundaries, the judge ought first to examine, whether it be absolutely requisite to proceed to an adjudication; in one case, it is undoubtedly so; viz. when it becomes expedient, that grounds should be divided by more conspicuous boundaries than formerly; for necessity then requires, that a part of one man's ground should be adjudged to another, in which case it is incumbent upon a judge to condemn him, whose estate is enlarged, to pay an equivalent to the other, whose estate is diminished. By this action, that any one may be prosecuted, who hath*

natur; veluti si quis jubente judice metur agros passus non fuerit.

committed fraud in relation to boundaries, either by removing stones, or cutting down trees, which were landmarks. The same action will also subject any man to condemnation on account of contumacy, if he refuse to suffer his lands to be measured at the command of a judge.

De adjudicatione.

§ VII. Quod autem istis judiciis alicui adjudicatum fuerit, id statim ejus fit, cui adjudicatum est.

§ 7. *Whatever is adjudged to a party in any of these actions, instantly becomes the property of him, to whom it was adjudged.*

TITULUS DECIMUS-OCTAVUS.

DE PUBLICIS JUDICIIS.

De differentiâ à privatis.

PUBLICA judicia neque per actiones ordinantur; neque omninò quicquam simile habent cum cæteris judiciis, de quibus locuti sumus: magnaque diversitas eorum est et in instituendo et in exercendo.

Public judgments are not introduced by actions; nor are they in any thing similar to the judgments, of which we have been treating. They also differ greatly from one another in the manner of being instituted and prosecuted.

Etymologia.

§ I. Publica autem dicta sunt, quod cuivis ex populo executio eorum plerùmque datur.

§ 1. *They are called public, because they may be sued to execution by any of the people.*

Divisio.

§ II. Publicorum judiciorum quædam capitalia sunt, quædam non capitalia. Capitalia dicimus, quæ

§ 2. *Of these judgments some are capital, others not. We term those capital, by which a criminal is pro-*

ultimo supplicio afficiunt homines, vel etiam aquæ et ignis interdictione, vel deportatione, vel metallo. Cætera, si quam infamiam irrogant cum damno pecuniario, hæc publica quidem sunt, sed non capitalia.

hibited from fire and water, or condemned to death, to banishment, or to the mines. Others, by which men are fined and rendered infamous, are public indeed, but not capital.

Exempla. De læsâ majestate.

§ III. Publica autem judicia hæc sunt. Lex Julia majestatis, quæ in eos, qui contra imperatorem vel rempublicam aliquid moliti sunt, suum vigorem extendit. Cujus pœna animæ amissionem sustinet, et memoria rei etiam post mortem damnatur.

§ 3. *The following are public judgments. The law* Julia majestatis *extends its force against those, who have undertaken any enterprize against the emperor or the republic. The penalty is the loss of life, and the memory of the offender becomes infamous after his death.*

De adulteriis.

§ IV. Item lex Julia de adulteriis coercendis, quæ non solùm temeratores alienarum nuptiarum gladio punit, sed et eos, qui cum masculis nefandam libidinem exercere audent. Sed eâdem lege etiam stupri flagitium punitur, cum quis sinè vi vel virginem vel viduam honestè viventem stupraverit. Pœnam autem eadem lex irrogat stupratoribus; si honesti sunt, publicationem partis dimidiæ bonorum; si humiles, corporis coercitionem cum relegatione.

§ 4. *The law* Julia, *for the suppression of adulteries, not only punishes with death those who violate the marriage bed of others, but those also, who commit acts of detestable lewdness with persons of their own sex. It also inflicts punishment upon all who are guilty of the crime called* stuprum: *that is, the debauching a virgin, or a widow of honest fame, without force. The punishment of this crime in persons of condition is the confiscation of a moiety of their possessions; offenders of low degree, undergo corporal chastisement with relegation.*

De sicariis.

§ V. Item lex Cornelia de sicariis, quæ homicidas ultore ferro persequitur, vel eos, qui hominis occidendi causâ cum telo ambulant.

§ 5. *The law* Cornelia de sicariis *punishes those, who commit murder, with death, and those also, who carry weapons, with intent to kill*

Telum autem, ut Cajus noster ex interpretatione legum duodecim tabularum scriptum reliquit, vulgò quidem id appellatur, quod arcu mittitur; sed et nunc omne significat, quod manu cujusque jacitur. Sequitur ergò, ut lignum, et lapis, et ferrum, hoc nomine contineantur; dictum aò eo, quod in longinquum mittitur, a Græca voce τηλε figuratum. Et hanc significationem invenire possumus et in Græco nomine; nam, quod nos telum appellamus, illi βιλος appellant ἀπο του βαλλεσθαι. Admonet nos Xenophon; nam ita scribit: Και τα βιλη ὁμου εφερετο, λογχαι, τοξευματα, σφενδοναι, πλατεαι δε και λιθοι. Sicarii autem appellantur à sicâ, quod significat ferreum cultrum. Eâdem lege et venefici capite damnantur, qui artibus odiosis, tam venenis, quam susurris magicis, homines, occiderint; vel mala medicamenta publicè vendiderint.

The term telum, *according to* Caius's *interpretation, commonly signifies an arrow made to be shot from a bow, but it is now used to denote any missile weapon, or whatever is thrown from the hand; hence a club, a stone, or a piece of iron, may be comprehended under that appellation. The word* telum *is evidently derived from the* Greek *adverb* τηλε, procul, *because thrown from a distance. And we may trace the same analogy in the* Greek *word* βιλος: *for what we call* telum, *the* Greeks *term* βιλος, *from* βαλλεσθαι *to throw; and of this we are informed by* Xenophon, *who writes thus:* Darts also were carried, spears, arrows, slings and a multitude of stones. *Assassins and murderers are called* sicarii *from* sica, *which signifies a short crooked sword or ponyard. The same law also inflicts a capital punishment upon those, who practice odious arts, or sell pernicious medicaments, occasioning the death of mankind, as well by poison, as by magical incantations.*

De parricidiis.

§ VI. Alia deinde lex asperrimum crimen novâ pœnâ persequitur, quæ Pompeia de parricidiis vocatur; quâ cavetur, ut, si quis parentis aut filii, aut omninò affectionis ejus, quæ nuncupatione parentum continetur, fata præparaverit, (sivè clàm, sivè palàm, id ausus fuerit,) nec non is, cujus dolo malo id factum est, vel conscius

6. *The law* Pompeia *inflicts a new punishment upon those who commit parricide, the most execrable of all crimes. This law ordains that whoever, either publicly or privately, hastens the death of a parent or a child, or of any person comprized under the tye, or denomination of a parent, shall be punished as a parricide; and he also, who hath*

criminis existit, licèt extraneus sit, pœnâ parricidii puniatur: et neque gladio, neque ignibus, neque ulli solemni pœnæ subjiciatur, sed insutus culeo cum cane, et gallo gallinaceo, et viperâ, et simiâ, et inter eas ferales angustias comprehensus, (secundùm quod regionis qualitas tulerit,) vel in vicinum mare, vel in amnem projiciatur; ut omnium elementorum usu vivus carere incipiat, et ei cœlum superstiti, et terrâ mortuo, auferatur. Si quis autem alias cognatione vel affinitate personas conjunctas necaverit, pœnam legis Corneliæ de sicariis sustinebit.

advised, or been privy to the transaction, although a stranger. A criminal, in this case, is not put to death by the sword, by fire, nor by any ordinary punishment; the law directs, that he shall be sewed up in a sack, with a dog, a cock, a viper, and an ape, and, being put up in this horrid inclosure, shall be thrown either into the sea, or an adjacent river, according to the situation of the place, where the punishment is inflicted: thus he is deprived of the very elements, while living; so that his living body is denied the benefits of the air, and his dead body the use of the earth. But, if a man be guilty of the murder of any other person, related to him, either by cognation or affinity, he is only subject to the punishment inflicted by the law Cornelia de sicariis.

De falsis.

§ VII. Item lex Cornelia de falsis, quæ etiam testamentaria vocatur, pœnam irrogat ei, qui testamentum vel aliud instrumentum falsum scripserit, signaverit, recitaverit, subjecerit, vel signum adulterinum fecerit, sculpserit, expresserit, sciens, dolo malo. Ejusque legis pœna, in servos ultimum supplicium est; quod etiam in lege Cornelià de sicariis et veneficis servatur: in liberos verò deportatio.

§ 7. *The law* Cornelia de falsis, *which is also called* testamentaria, *punishes those who fraudulently write, sign, recite, or clandestinely offer for signature a false will, or any other instrument; or make, engrave or stamp, or in any manner counterfeited the seal of another. The punishment by this law upon slaves is death; as it is by the law* Cornelia *concerning assassins and poisoners; upon freemen, deportation.*

De vi.

§ VIII. Item lex Julia de vi

§ 8. *The law* Julia, *concerning*

publicâ seu privatâ adversus eos exoritur, qui vim vel armatam, vel sinè armis, commiserint; sed, siquidem armata vis arguatur, deportatio ei ex lege Juliâ de vi publicâ irrogatur; si verò sinè armis, in tertiam partem bonorum suorum publicatio imponitur. Sin autem per vim raptus virginis, vel viduæ, vel sanctimonialis, vel alterius, fuerit perpetratus, tunc et raptores, et ii, qui opem huic flagitio dederunt, capite puniuntur, secundùm nostræ constitutionis definitionem, ex quâ hoc apertius possibile est scire.

public and private force, take place against all, who use force, whether armed or unarmed; but, if proof be made of an armed force, the punishment is deportation by that law; and, if the force be not accompanied with arms, the penalty is confiscation of one third part of the offender's goods: nevertheless, if a rape be committed upon a virgin, a widow, a nun, or upon any other person, both the ravishers and their accomplices are all equally subject to capital punishment, according to the decision of our constitution; from which more may be known of this subject.

De peculatus.

§ IX. Item lex Julia peculatûs eos punit, qui publicam pecuniam, vel rem sacram, vel religiosam, furati fuerint. Sed, siquidem ipsi judices tempore administrationis publicas pecunias subtraxerint, capitali animadversione puniuntur; et non solùm hi, sed etiam qui ministerium eis ad hoc exhibuerint, vel qui subtractas ab his susceperint. Alii vero, qui in hanc legem inciderint, pœnæ deportationis subjugentur.

§ 9. *The law* Julia de peculatu *punishes those, who have been guilty of theft, in regard to public money, or any thing, which is sacred; but, if judges themselves, while in office commit a theft of this kind, their punishment is capital; and so is the punishment of all those, who assist in such a theft, or knowingly receive the money stolen. But all other persons, who offend against this law, are only subject to deportation.*

De plagiariis.

§ X. Est et inter publica judicia lex Fabia de plagiariis, quæ interdùm capitis pœnam ex sacris constitutionibus irrogat, interdùm leviorem.

§ 10. *The law* Fabia *against plagiaries, ranks also among public judgments; but by the imperial constitutions, offenders against this law, are sometimes punished with death, and sometimes by a milder punishment.*

De ambitu, repetundis, annona, residuis.

§ XI. Sunt præterea publica judicia; lex Julia de ambitu, lex Julia repetundarum, et lex Julia de annonâ, et lex Julia de residuis, quæ de certis capitulis loquuntur, et animæ quidem amissionem non irrogant; aliis autem pœnis eos subjiciunt, qui præcepta earum neglexerint.

§ 11. *There are also other public judgments; such are the* Julian *laws* de ambitu, repetundarum, de annonâ, de residuis; *which do not punish with death, but inflict other punishments upon those, who offend.*

Conclusio.

§ XII. Sed de publicis judiciis hæc exposuimus, ut vobis possibile sit summo digito, et quasi per indicem, ea tetigisse; alioqui diligentior eorum scientia vobis, ex latioribus digestorum seu pandectarum libris, Deo propitio adventura est.

§ 12. *Thus much we have stated on the subject of public judgments, as an index, to give a general idea of that knowledge, which, through the blessing of God, may be most fully and particularly obtained, by perusing the digests with a diligent attention.*

FINIS

LIBRI QUARTI ET ULTIMI
INSTITUTIONUM.

NOV. CXVIII.

ΚΕΦ. Α.

Περὶ διαδοχῆς τῶν κατιόντων.

Εἴ τις τοίνυν τῶν κατιόντων ὑπείη τῷ ἀδιαθέτῳ τελευτήσαντι, εἰσαεὶ ποτὲ φύσεως ἢ βαθμοῦ, εἴτε ἐξ ἀρρενογονίας, εἴτε ἐκ θηλυγονίας καταγομένης, καὶ εἴτε αὐτεξουσίοις εἴτε ὑπεξουσίοις ἐπὶ πάντων τῶν ἀνιόντων καὶ τῶν ἐκ πλαγίου συγγενῶν προτιμᾶσθαι. Κἂν γὰρ ὁ τελευτήσας ἑτέρου ὑπεξούσιος ἦν, ὅμως τοὺς αὐτοῦ παῖδας, εἰσαεὶ ποτὲ ἂν ὦσι φύσεως ἢ βαθμοῦ, καὶ αὐτῶν τῶν γονέων προτιμᾶσθαι κελεύομεν. ἂν ὑπεξούσιος ἦν ὁ τελευτήσας, ἵν' ἐκείνοις δηλαδὴ τοῖς πράγμασιν, ἅτινα κατὰ τοὺς ἄλλους ἡμῶν νόμους, τοῖς πατράσιν ἐπροσποριζέτην· ἐπὶ γὰρ τῇ χρήσει τῶν πραγμάτων τούτων, ὀφείλουσι προσποριζέσθαι ἢ φυλαττέσθαι, τοὺς περὶ τούτων ἡμῶν νόμους τοῖς γονεῦσι φυλαττόμεν οὕτω μειζόνως ὡς, εἴ τινα τούτων τῶν καθιόντων παῖδας καταλιποῖεν τελευτήσαι συμβαίη, τοὺς ἐκείνου υἱοὺς ἢ θυγατέρας ἢ τοὺς ἄλλους καθιόντας εἰς τὸν τοῦ ἰδίου γονέως τόπον ὑπεισιέναι, εἴτε ὑπεξουσίου τοῦ τελευτήσαντος, εἴτε αὐτεξουσίου εὑρεθεῖεν τοσοῦτον ἐκ τῆς κληρονομίας τοῦ τελευτήσαντος λαμβάνοντας μέρος, ὅσου δηποτὲ ἂν ὦσιν, ὅσον ὁ αὐτῶν γονεὺς, εἰ ζώοιεν, ἐκομίζετο· ἂν τινα διαδοχὴν in stirpes ἡ ἀρχαιότης ἐκάλεσεν ἐπὶ ταύτης γὰρ τῆς τάξεως τὸν βαθμὸν ζητεῖσθαι οὐ βουλόμεθα· ἀλλὰ μετὰ τῶν υἱῶν καὶ τῶν θυγατέρων τοὺς ἐκ τοῦ προτελευτήσαντος υἱοὺς ἢ θυγατέρας ἐγγόνους καλεῖσθαι διατάττομεν· ἀδήμιτος εἰσαγομένης διαφορᾶς, εἴτε ἀρρένες εἴτε θήλειαι ὦσι, καὶ εἴτε ἐξ ἀρρενογονίας εἴτε ἐκ θηλυγονίας καταγωνται, εἴτε ὑπεξούσιοι, εἴτε

CAP. I.

De descendentium successione.

Si quis igitur descendentium fuerit ei, qui intestatus moritur, cujuslibet naturæ aut gradus, sive ex masculorum genere sive ex fœminarum descendens, et sive suæ potestatis, sive sub potestate sit, omnibus ascendentibus et ex latere cognatis præponatur. Licet enim defunctus sub alterius potestate fuerit, tamen ejus liberos, cujuslibet sexus sint aut gradus, etiam ipsis parentibus præponi præcipimus, quorum sub potestate fuerit, qui defunctus est; in illis videlicet rebus, quæ, secundum nostras alias leges, patribus non acquiruntur; nam in usu harum rerum, qui debet acquiri aut servari, nostras de his omnibus leges parentibus custodimus: sic tamen, ut, si quem horum descendentium filios relinquentem mori contigerit, illius filios aut filias, aut alios descendentes, in proprii parentis locum succedere, sive sub potestate defuncti, sive suæ potestatis inveniantur; tantam de hæreditate morientis accipientes partem, quanticunque sint, quantam eorum parens, si viveret, habuisset; quam successionem *in stirpes* vocavit antiquitas: in hoc enim ordine gradum quæri nolumus; sed, cum filiis et filiabus, ex præmortuo filio aut filia nepotes vocari sancimus; nulla introducenda differentia, sive masculi si-

και αντεξουσιοι εισιν. Και ταυτα μεν περι της των κατιοντων διαδοχης ετυπωσαμεν.

ve fœminæ sint, et seu ex masculorum seu fœminarum prole descendant, sive suæ potestatis, sive sub potestate sint constituti. Et hæc quidem de successionibus descendentium disposuimus.

CHAPTER I.

Of the succession of descendants.

If a man dies intestate, leaving a descendant of either sex or any degree, such descendant, whether he derives his descent from the male or female line, or whether he is under power or not, is to be preferred to all ascendants and collaterals. And, although the deceased was himself under paternal power, yet we ordain, that his children of either sex or any degree shall be preferred in succession to the parents, under whose power the intestate died, in regard to those things, which children do not acquire for their parents, according to our other laws; for we would maintain the laws in respect to the usufruct, which is allowed to parents: so that, if any of the descendants of the deceased should die, leaving sons or daughters or other descendants, they shall succeed in the place of their own father, whether they are under his power or *sui juris*, and shall be entitled to the same share of the intestate's estate, which their father would have had, if he had lived; and this kind of succession has been termed by the ancient lawyers a succession *in stirpes:* for in the succession of descendants we allow no priority of degree, but admit the grandchildren of any person by a deceased son or daughter to be called to inherit that person together with his sons or daughters, without making any distinction between males and females, or the descendants of males and females, or between those, who are under power, and those, who are not. These are the rules, which we have established, concerning the succession of descendants.

Ει τις τοινυν. Si quis igitur.] The three first chapters of this novel constitution deserve the attentive consideration of the reader, not only because they contain the latest policy of the civil law in regard to the disposition of the estates of intestates; but because they are the foundation of our statute law in this respect. Vid. *Holt's* cases, p. 259. *Peere Williams's* rep. p. 27. Prec. in chan. p. 593. Sir *Thom. Raymond's* rep. p 496. And they are still almost of continual use, by being the general guide of the courts in *England*, which hold cognizance of distributions, in all those cases, concerning which our own laws have either been silent, or not sufficiently express.

Εις τον τη ιδια γονεως. In proprii parentis locum succedant.] Nothing is more clear in the civil law, than that grandchildren, even when alone, (although they descend from various stocks and are unequal in their numbers,) would take the estate of their deceased grand-father *per stirpes*, and not *per capita*. Suppose therefore, that *Titius* should die, leaving grandchildren by three different sons, already dead; to wit, three by one son, six by another, and twelve by another; each of these classes of grandchildren would take a third of the estate without any regard to the inequality of the numbers in each class. But, as to this point in *England*, the law reports mention no judicial determination; yet it seems probable, that the courts, in which distributions are cognizable, would order the division of an estate in such a case to be made *per capita*; and this, partly from a motive of equity, and partly from a consideration of the intent of the statute, relating to the estates of intestates; for the statute directs an *equal* and *just* distribution: and, when the act mentions representation, it must be understood to refer to it, in those cases only, where representation is necessary to prevent exclusion, but not to refer to it, in those cases, where all the claimants are in equal degree, and therefore can take *suo quisque jure*, each in his own right. Vid. 23, 24, Car. 2. cap. 10. Lib. 3. Inst. p. 4.

ΚΕΦ. Β.

Περὶ τῶν ἀνιόντων διαδοχῆς.

Εἰ τοίνυν ὁ τελευτήσας καλίοντας μὲν μὴ καταλίποι κληρονόμους, παῖδας δὲ ἢ μητέρα ἢ ἄλλους γονεῖς αὐτῷ ἐπιζήσουσι, πᾶσιν τοῖς ἐκ πλαγίου συγγενῶν τέλος περαίνεσθαι διατάττομεν, ἐξαιρουμένων μόνων ἀδελφῶν ἐξ ἑκατέρου γονέως συναπτομένων τῷ τελευτήσαντι, ὡς διὰ τῶν ἑξῆς δηλωθήσεται. Εἰ δὲ πολλοὶ τῶν ἀνιόντων περίεισι τέλος περαίνεσθαι κελεύομεν, οἱ τινες ἐγγύτεροι τῷ βαθμῷ εὑρεθῶσιν, ἄρρενάς τε καὶ θηλείας, εἴτε πρὸς μητρὸς εἴτε πρὸς πατρός εἰσιν Εἰ δὲ τῶν αὐτῶν ἴσχυσι βαθμῶν, ἐξ ἴσης εἰς αὐτοὺς ἡ κληρονομία διαιρεθήσεται, ὥστε τὸ μὲν ἥμισυ λαμβάνειν πάντας τοὺς πρὸς πατρὸς ἀνιόντας, ὅσοι δηπόθεν ἂν ὦσι· τὸ δὲ ὑπόλοιπον ἥμισυ τοὺς πρὸς μητρὸς ἀνιόντας, ὅσους δηπόθεν ἂν αὐτοὺς εὑρεθῆναι συμβαίη. Εἰ δὲ μέλλει τῶν ἀνιόντων εὑρεθῶσιν ἀδελφοὶ ἢ ἀδελφαὶ ἐξ ἑκατέρων γονέων συναπτόμενοι τῷ τελευτήσαντι, μέλλει τῶν ἐγγύτερον τῷ βαθμῷ ἀνιόντων κληθήσεσθαι, εἴ καὶ παῖδες ἢ μήτηρ εἶησαν· διαιρεμένης εἰς αὐτοὺς δηλαδὴ τῆς κληρονομίας κατὰ τὸν τῶν προσώπων ἀριθμόν, ἵνα καὶ τῶν ἀνιόντων καὶ τῶν ἀδελφῶν ἑκάστος ἴσην ἴσχοι μοῖραν, ὑδδομαν χρῆσιν ἐκ τῆς τῶν υἱῶν ἢ θυγατέρων μοίρας ἐν τύπῳ τῷ θεμελίῳ δυναμένου τοῦ πατρὸς ἑαυτῷ παντελῶς ἀδικεῖν, ἐπειδὴ ἀντὶ ταύτης τῆς χρήσεως μέρος αὐτῷ τῆς κληρονομίας καὶ κατὰ δεσποτείαν δίκαιον διὰ τὴν παροῦσαν διδασκαλίαν νόμῳ, ὑδδομιαίας φυλαττομένης διαφορᾶς μόλιστα τῶν προσώπων τούτων, εἴτε θήλεια εἴτε ἄρρενες εἶησαν οἱ πρὸς τὴν κληρονομίαν καλούμενοι, καὶ εἴτε δι' ἀρρένος ἢ θηλείας προσώπου συναπτοίντο· καὶ εἴτε αὐτεξούσιος οὗτος ὑπεξούσιος ἦν, ὃν διαδέχοιτο.

CAP. II.

De ascendentium successione.

SI igitur defunctus descendentes quidem non relinquat hæredes, pater autem aut mater aut alii parentes ei supersint, omnibus ex latere cognatis hos præponi sancimus, exceptis solis fratribus ex utroque parente conjunctis defuncto, sicut per subsequentia declarabitur. Si autem plurimi ascendentium vivunt, hos præponi jubemus, qui proximi gradu reperiuntur, masculos et fœminas, sive paterni, sive materni sint. Si autem eundem habeant gradum, ex æquo inter eos hæreditas dividatur, ut medietatem quidem accipiant omnes a patre ascendentes, quanticunque fuerint; medietatem vero reliquam a matre ascendentes, quantoscunque eos inveniri contigerit. Si vero cum ascendentibus inveniantur fratres aut sorores ex utrisque parentibus conjuncti defuncto, cum proximis gradu ascendentibus vocabuntur, si et pater aut mater fuerint; dividenda inter eos quippe hæreditate secundum personarum numerum, uti et ascendentium et fratrum singuli æqualem habeant portionem; nullum usum ex filiorum aut filiarum portione in hoc casu valente patre sibi penitus vindicare, quoniam, pro hac usus portione, hæreditatis jus et secundum proprietatem per præsentem dedimus legem; differentia nulla servanda inter personas istas, sive fœminæ sive masculi fuerint, qui ad hæreditatem vocantur; et sive per masculi sive per fœminæ personam copulantur; et sive suæ potestatis sive sub potestate fuerit is, cui succedunt.

CHAPTER II.

Of the succession of ascendants.

But, when the deceased leaves no descendants, if a father, or mother, or any other parents, grand-fathers, great-grand-fathers, &c. survive him, we decree, that they shall be preferred to all collateral relations except brothers of the whole blood to the deceased, as shall hereafter be more particularly declared. But, if many ascendants are living, we prefer those, who are in the nearest degree, whether they are male or female, paternal or maternal; and, when several ascendants concur in the same degree, the inheritance of the deceased must be so divided, that the ascendants on the part of the father may receive one-half, and the ascendants on the part of the mother the other half, without regard to the number of persons on either side. But, if the deceased leaves brothers and sisters of the whole blood together with ascendants, these collaterals of the deceased shall be called with the nearest ascendants, although such ascendants are a father or mother; and the inheritance must be so divided according to the number of persons, that each of the ascendants, and each of the brothers, may have an equal portion; nor shall the father in this case take to himself any usufruct of the portions belonging to his sons and daughters, because by this law we have given him the absolute property of one portion: and we suffer no distinction to be made between those persons, who are called to an inheritance, whether they are males or females, or related by males or females, or whether he, to whom they succeed, was, or was not, under power, at the time of his decease.

Εἰ καὶ ζαλης ὁ μητης ἀσαν. Si et pater aut mater fuerint.] By the law of *England*, when a person dies intestate, leaving a father, the father is solely entitled to the whole personal estate of the intestate, exclusive of all others; and anciently, [i. e. in the reign of *Henry* the first, vid. li. Hen. primi, *Wilkins* editore, p. 266.] a surviving father, or mother, could have taken even the real estate of their deceased child. But this law of succession was altered soon afterwards; for we find by *Glanville*, that, in the time of *Henry* the second, a father or mother could not have taken the real estates of their deceased children, the inheritance being then carried over to the collateral line. Vid. *Glanville*, lib. 7. cap. 1, 2, &c. 1 *Peere Williams* 50. And it has ever since been held as an inviolable maxim, that an inheritance cannot ascend. *Co. Litt.* 11. a. But this alteration in the law, made since the reign of *Henry* the first, did not extend to personal estate, so that, before the statute of the first of *James* the second, if a child had died intestate without a wife, child, or father, the mother would have been entitled to the whole personal estate, exclusive of the brothers and sisters of the intestate; but it is enacted by that statute, "that, if, after the "death of a father, any of his children shall "die intestate, without wife or children, in "the lifetime of the mother, every brother "and sister, and their representatives, shall "have an equal share with her." 1 *Jac.* 2. cap. 17. § 6.

But, should it here be asked, whether the brother of an intestate would exclude the grand-father by the civil law? the novel appears at first sight to answer it very fully in the negative by enacting, "*that, if the deceased "leaves brothers and sisters together with "ascendants in the right line, these collaterals "shall be called with the nearest ascendants,*" &c. And indeed the generality of writers, namely, *Guelin*, *Forster*, *Ferriere*, *Domat*, and others, all understand this passage, as admitting ascendants and brothers to take jointly; yet a contrary interpretation hath been given by some civilians, of whom *Voet* is the principal, whose arguments in support of it are therefore here copied at large.

"Illud non satis expeditum est, an etiam "cum avo aut proavo, ubi alius proximior "ascendens non est, fratres germani ejus, "qui defunctus est, concurrere debeant, an "magis avo proavove præferendi sunt, eos- "que excludant? Concursum enim ascenden- "tium naturaliter gradu remotiorum, quos "nullus intermedius existens excludit, cum "fratribus germanis defuncti turentur pleri- "que, moti eo, quod cum *proxime ascenden-*

"*tibus* fratres veniunt. Vid. novel. 118. Proxi-
"mus autem sit, quem nemo antecedit."

"Sed juris rationibus convenientius vide-
"tur, avum proavumve defuncti a fratribus
"ejus germanis in successione excludi; quia
"imperator in dicta Novella 118. emphatice
"dixit, fratres et sorores cum *proximis gra-*
"*du ascendentibus* vocari; qualis mentio *prox-*
"*imorum gradu* inutilis plane ac superflua
"esset, si non per *gradu proximos* denotaren-
"tur illi, qui in primo lineæ ascendentis gra-
"du sunt; cum juris certi atque indubitati
"sit, nunquam in ascendente linea locum es-
"se juri repræsentationis, per quod remotior
"subintraret in locum proximioris defuncti;
"atque adeo suffecisset, si generaliter ex-
"pressum esset, fratres cum *ascendentibus*
"vocari. Ne dicam hoc ipso, quo in linea
"ascendente repræsentatio personæ proxi-
"mioris admissa non est, fieri non posse, ut
"avus vel proavus defuncti, qui a patre vel
"matre defuncti certo certius excluditur,
"concurreret cum fratribus, qui cum patre
"matreque defuncti concurrunt. Quibus ac-
"cedit, quod sententia, de avo defuncti cum
"germanis ejus fratribus concurrente, ad ab-
"surda ducit. Si enim verum est, quod in
"casu quo fratres et sorores cum proximis
"gradu ascendentibus ita concurrant, ut hæ-
"reditas inter eos secundum personarum nu-
"merum dividenda sit, ac ascendentium et
"fratrum singuli æqualem habeant portio-
"nem secundum d. Nov. 118. eveniret neces-
"sario, ut remotiores ascendentes ob defec-
"tum proximiorum cum fratribus defuncti
"concurrentes plus fratribus nocituri essent,
"quam proximiores; dum, positis duobus
"fratribus germanis defuncti, pater et mater
"concurrens duas tantum partes æquales au-
"ferendo efficerent, ut fratres singuli quar-
"tam hæreditatis fraternæ partem capiant;
"quatuor autem avi aviæque existentes, vi-
"riles totidem partes occupando, non nisi
"sextam singulis defuncti fratribus relicturi
"essent; sicuti tantum partem decimam duo
"fratres singuli essent habituri, si cum pro-
"avis atque proaviabus (quales octo esse
"possunt) deberent concurrere. Quam autem
"a ratione id alienum sit, ut magis aliis
"concursu suo noceant remotiores, quam qui
"ejusdem lineæ proximiores sunt, nemo, ut
"opinor, non sponte satis agnoscit. Denique
"tantum concursum esse fratrum cum patre
"et matre, non vero cum aliis ascendentibus
"remotioribus, ubi pater materque deficit,
"aperte probant verba Novellæ 118. dum il-
"lic diserte cautum, si cum ascendentibus
"inveniuntur fratres aut sorores ex utrisque
"parentibus conjuncti defuncto, eos *cum*
"*proximis gradu ascendentibus vocari, si aut*
"*pater aut mater fuerint:* unde sequitur, eos
"non omni casu, nec promiscue cum omni-
"bus ascendentibus, venire; sed *si pater aut*
"*mater fuerint:* ideoque mox igitur subjici-
"tur, in hoc casu *patrem nullum usum, ex*
"*filiorum aut filiarum portione, posse sibi peni-*
"*tus vindicare*, nulla *avi* facta mentione; cum
"tamen id *avo* æqua interdicendum fuisset,
"si et avus cum defuncti nepotis fratribus
"succedere potuisset, dum fratres succe-
"dentes æque potuissent in avi quam in pa-
"tris potestate esse. Ut proinde nihil in con-
"trarium efficiat, quod, in jure, proximus
"dicatur, quem nemo antecedit; cum id tum
"demum admitti debeat, quando nulla inde
"absurditas profluit; prout in hoc casu futu-
"rum, supra monstratum est." Vid. *Joannis Voet.* com. ad Pandectas, tom. 2. lib. 38. t. 17 § 13.

But this question seems now to be settled in *England* in consequence of three determinations; the first of which was given in the Exchequer in the case of *Poole* v. *Wilshaw* on the 9th of July, 1708:—the second in the case of *Norbury* v. *Vicars*, before Mr. *Fortescue*, master of the rolls in November 1749:—and the third was delivered on the 14th January, 1754, in the case of *Evelin* v. *Evelin*, by the lord chancellor, who decreed in favour of the brother in exclusion of the grand-father, having founded his opinion partly in deference to the former determinations; partly in consideration of the *present* common law computation of degrees, relative to *real* estates; and partly upon the benefit, which must accrue to the public by preferring a younger man to an older, the brother of a deceased person to the grand-father, *propter spem accrescendi.*

And it was also declared to be the opinion of the court, that, if the point in question had been *res integra*, and solely determinable by the *Roman* law, the decree would still have been the same; which declaration, from so high an authority, must have great weight in ascertaining of the Novel, and must incline civilians in general to think more favourably for the future of *Voet's* arguments, which were particularly quoted and much relied upon by the court.

ΚΕΦ. Γ.

Περὶ διαδοχῆς τῶν ἐκ πλαγίου καλουμένων.

Εἰ τοίνυν ὁ τελευτήσας μηδὲ κατιούσας μηδὲ ἀνιούσας καταλείψῃ, πρώτους πρὸς τὴν κληρονομίαν καλοῦμεν τοὺς ἀδελφοὺς καὶ τὰς ἀδελφὰς τοὺς ἐκ τοῦ αὐτοῦ πατρὸς καὶ τῆς αὐτῆς μητρὸς τιχθέντας, οὓς καὶ μετὰ τῶν πατέρων πρὸς τὴν κληρονομίαν ἐκαλέσαμεν. Τούτων δὲ μὴ ὑπόντων, ἐν δευτέρᾳ τάξει ἐκείνους τοὺς ἀδελφοὺς πρὸς τὴν κληρονομίαν καλοῦμεν, οἱ τινες ἐξ ἑνὸς γονέως συναπτόμενοι τῷ τελευτήσαντι, εἴτε διὰ τοῦ πατρὸς μόνου, εἴτε διὰ τῆς μητρὸς. Εἰ δὲ τῶν τελευτησάντων ἀδελφοὶ ὑπέκεινται, καὶ ἑτέρου ἀδελφοῦ ἢ ἀδελφῆς προτελευτησάντων παῖδες, κληθήσονται πρὸς τὴν κληρονομίαν ὅτοι μετὰ τῶν πρὸς πατρὸς καὶ πρὸς μητρὸς θείων ἄρρενόν τε καὶ θήλειαν· καὶ, ὅσοι δήποτε ὦσι, τοσοῦτον ἐκ τῆς κληρονομίας λήψονται μέρος, ὅσον ὁ αὐτῶν γονεὺς ἡμέλλε λαμβάνειν, εἰ ἐπέζησεν. Ὅθεν ἀκολουθόν ἐστιν, ἵνα, εἰ τυχὸν ὁ προτελευτήσας ἀδελφὸς, ἀφ' οὗ παῖδες περιέπεσον, δι' ἑκάτερα γονέως τῷ νῦν τελευτήσαντι προσώπῳ συνηπτόμεθα, οἱ δὲ περιόντες ἀδελφοὶ διὰ τοῦ πατρὸς μόνου τυχόν, ἢ τῆς μητρὸς, αὐτῷ συνηπτόμεθα, πρωτιμηθήσονται οἱ τούτου παῖδες τῶν ἰδίων θείων, εἰ καὶ τρίτου εἰσὶ βαθμοῦ, εἴτε πρὸς πατρὸς εἴτε πρὸς μητρὸς εἰσὶν οἱ θεῖοι, καὶ εἴτε ἄρρενες εἴτε θήλειαι, ὥσπερ ὁ αὐτῶν γονεὺς προετιμᾶτο, εἰ ἔζη. Καὶ ἐκ τῶν ἐναντίων· εἰ ὁ μὲν περιὼν ἀδελφὸς ἐξ ἑκατέρου γονέως συναπτόμενος τῷ τελευτήσαντι, ὁ δὲ προτελευτήσας δι' ἑνὸς γονέως συνῆπτετο, τοὺς τούτου παῖδας ἐκ τῆς κληρονομίας ἀποκλείομεν, ὥσπερ καὶ αὐτὸς, εἰ ἔζη, ἐξεκλείετο. Τὸ δὲ τοιοῦτον προνόμιον ἐν ταύτῃ τῇ τάξει τῆς συγγενείας μόνοις παρέχομεν τοῖς τῶν ἀδελφῶν, ἀρρένων ἢ θηλειῶν, υἱοῖς ἢ θυγατράσιν, ἵνα εἰς τὰ τῶν ἰδίων γονέων δίκαια ὑπεισέλθωσιν· ἀδύνατον δὲ

CAP. III.

De successione ex latere venientium.

Si igitur defunctus neque descendentes neque ascendentes reliquerit, primos ad hæreditatem vocamus fratres et sorores ex eodem patre et ex eadem matre natos, quos etiam cum patribus ad hæreditatem vocavimus. His autem non existentibus, in secundo ordine illos fratres ad hæreditatem vocamus, qui ex uno parente conjuncti sunt defuncto, sive per patrem solum, sive per matrem. Si autem defuncto fratres fuerint, et alterius fratris aut sororis præmortuorum filii, vocabuntur ad hæreditatem isti cum de patre et matre thiis, masculis et fœminis: et, quanticunque fuerint, tantam ex hæreditate percipient portionem, quantam eorum parens futurus esset accipere, si superstes esset. Unde consequens est, ut, si forte præmortuus frater, cujus filii vivunt, per utrumque parentem nunc defunctæ personæ jungebatur, superstites autem fratres per patrem solum forsan aut matrem ei jungebantur, præponantur istius filii propriis thiis, licet in tertio sint gradu, (sive a patre sive a matre sint thii, et sive masculi sive fœminæ,) sicut eorum parens præponeretur, si viveret. Et ex diverso, siquidem superstes frater ex utroque parente conjungitur defuncto, præmortuus autem per unum parentem jungebatur, hujus filios ab hæreditate excludimus, sicut ipse, si viveret, ab hæreditate excludebatur. Hujusmodi vero privilegium in hoc ordine cognationis solis præbemus fratrum masculorum et fœminarum filiis aut filiabus, ut in suorum parentum

ἀλλὰ παντελῶς πρόσωπα, ἐκ τούτου τῆς τάξεως ἐχόμενον, τοῦτο τὸ δίκαιον συγχωροῦμεν. Ἄλλα καὶ αὐτοῖς τοῖς τῶν ἀδελφῶν παισὶ τοῦτο τοῦτον τὴν εὐεργεσίαν παρέχομεν, ὅτε μέλλει τῶν ἰδίων κρίνεσθαι θηλέων, ἀρένων τε καὶ θηλείων, εἴτε πρὸς πατρὸς εἴτε πρὸς μητρὸς εἰσιν. Εἰ δὲ μέλλει τῶν ἀδελφῶν τοῦ τελευτήσαντος καὶ ἀνιόντες, ὡς ἤδη προεἰπομεν, πρὸς τὴν κληρονομίαν καλεῖσθαι, ἁδίνι τρόπῳ πρὸς τὴν ἐξ ἀδιαθέτου διαδοχὴν τοῦς τοῦ ἀδελφοῦ ἢ τῆς ἀδελφῆς παῖδας καλεισθαι συγχωροῦμεν· ἐὰν εἰ ἐξ ἑκατέρου γονέως ὁ αὐτῶν πατὴρ ἢ μήτηρ συνηπτέλο τ· τελευτήσαντι. Ὅπου τοινυν τοις τοῦ ἀδελφοῦ καὶ τῆς ἀδελφῆς παισι τοιοῦτο προνόμιον δεδώκαμεν, ἵνα τὸν τῶν γονέων ὑπεισιόντες τοπον, μόνοι τρίτῳ ὄντες βαθμῷ, μέλλουσι τῶν ἐκ δευτέρου βαθμοῦ πρὸς τὴν κληρονομίαν καλεῖσθαι· ἐκεῖνο πρόδηλον ἐστιν, ὅτι τῶν θηλέων τοῦ τελευτήσαντος ἀρρένων τε καὶ θηλείων. εἴτε πρὸς πατρὸς εἴτε πρὸς μητρὸς εἰσιν, πρόκριμα ἔχουσι, εἰ καὶ ἐκεῖνοι τρίτον ὁμοίως συγγενείας βαθμὸν ἔχοιεν.

Εἰ δὲ μήτε ἀδελφοὺς, μήτε παῖδας ἀδελφῶν, ὡς εἰρήκαμεν, ὁ τελευτήσας καταλειφθείη, παῖδας τοὺς ἀφεξῆς ἐκ πλαγίου συγγενεῖς πρὸς τὴν κληρονομίαν καλοῦμεν, κατὰ τὴν ἑνὸς ἑκάστου βαθμοῦ πρεσβείαν, ἵνα οἱ ἐγγύτεροι τῷ βαθμῷ αὐτοὶ τῶν λοιπῶν προτιμῶνται· εἰ δὲ πολλοὶ τοῦ αὐτοῦ βαθμοῦ εὑρεθῶσι, κατὰ τὸν τῶν προσώπων ἀριθμὸν μεταξὺ αὐτῶν ἡ κληρονομία διαιρεθήσεται· ὅπερ in capita οἱ ἡμέτεροι λέγουσι νόμοι.

jura succedant; nulli enim alii omnino personæ, ex hoc ordine venienti, hoc jus largimur. Sed et ipsis fratrum filiis tunc hoc beneficium conferimus, quando cum propriis judicantur thiis, masculis et fœminis, sive paterni sive materni sint. Si autem cum fratribus defuncti etiam ascendentes, (sicut jam diximus) ad hæreditatem vocantur, nullo modo ad successionem ab intestato fratris aut sororis filios vocari permittimus; neque si ex utroque parente eorum pater aut mater defuncto jungebatur. Quandoquidem igitur fratris et sororis filiis tale privilegium dedimus, ut, in propriorum parentum succedentes locum, soli in tertio constituti gradu, cum iis, qui in secundo gradu sunt, ad hæreditatem vocentur; illud palam est, quia thiis defuncti masculis et fœminis, sive a patre sive a matre, præponuntur, si etiam illi tertium cognationis similiter obtineant gradum. Si vero neque fratres, neque filios fratrum, sicut diximus, defunctus reliquerit, omnes deinceps a latere cognatos ad hæreditatem vocamus, secundum uniuscujusque gradus prærogativam, ut viciniores gradu ipse reliquis præponantur. Si autem plurimi ejusdem gradus inveniantur, secundum personarum numerum inter eos hæreditas dividatur; quod *in capita* nostræ leges appellant.

CHAPTER III.

Of the succession of collaterals.

If a man leaves neither descendants nor ascendants at the time of his death, we first call his brothers and sisters of the whole blood, whom we have also called to inherit with the fathers of deceased persons.

But, when there are no brothers of the whole blood with the deceased, we call those, who are either by the same father only, or by the same mother. And, if the deceased leaves brothers and also nephews by a deceased brother or sister, these nephews shall be called to succeed with their uncles and aunts of the whole

blood to the deceased; but, however numerous these nephews are, they shall be entitled only to that share, which their parent would have taken, if alive. From whence it follows, that, if a man dies and is survived by the children of a deceased brother of the whole blood, and also by brothers of the half blood, then his nephews, [that is, the children of his brother, by the whole blood,] are to be preferred to their uncles and aunts; for, although such nephews are themselves in the third degree, yet they are preferred, as their parent would have been, if living. And, on the contrary, if a man dies, and is survived by a brother of the whole blood, and by children of a brother of the half blood deceased, these nephews are excluded, as their father would have been, if he had lived. But among collaterals we allow the privilege of representation to the sons and daughters of brothers and sisters, and no farther; and we grant it only to brothers and sisters' children, when they concur with their u cles or aunts, paternal or maternal: for, when ascendants are called to inherit, we by no means permit the children of a deceased brother or sister to share in the succession; although the father or mother was of the whole blood with the deceased brother But we have so far allowed the right of representation to brothers and sisters' children, that, being only in the third degree, they are called to inherit with those, who are in the second; and this is evident, because brothers and sisters' children are preferred to the uncles and aunts of the deceased, paternal as well as maternal; although they are all in the third degree of cognation.

But, if a deceased person leaves neither brothers nor brothers' children, we then call all the other collaterals according to the prerogative of their respective degrees, preferring the nearer to the more remote; and, if many are found in th· same degree, the inheritance must be divided according to the number of persons; and our laws distinguish this manner of dividing an inheritance by calling it a division *in capita*.

Πρωΐως προς την κληρονομιαν. Primos ad hæreditatem vocamus.] We must here observe in relation to the di tinction between the whole blood and the half blood, that in *England* the rules of law are different, according to the nature of the estate, which is to be taken; for, in case of lands the whole blood is always preferred, and *the half blood is no blood inheritable by descent.* 1 *Co* inst 14 a. But, in respect to personal estate, the law has not always been fixed and certain; inasmuch as the statute of the 23d of *Car.* II. [for *the better settlement of the estates of intestates*] takes no notice of this distinction between the whole blood and the half blood, but directs, that distribution shall be made among all those, who are in equal degree of kindred to the intes'ate But, it being certain, that brothers and sisters of the half blood are in the same degree with brothers and sisters of the whole blood, it hath been the general opinion, that brothers and sisters of the half blood were entitled, by virtue of the statute, to an equal share of the intestate's estate, with the brothers and sisters of the whole blood, although there are several precedents of judgments given, since the statute, allowing the half blood to have but an half s are. But the law in this respect has been fully settled ever since the decree of the house of l rds in the case of *Watts* and others versus *Crooke*, upon an appeal from a decree in chancery, which had been given in favour of the half blood, and was affirmed by the house. Vid. *Showers's* Cases in Par. 108. and *Strahan's* Domat. 685. 2 Mod 294. *Harris.*

Οὐδενι τροπῳ. Nullo modo] "Sancimus, ut, "si quis moriens relinquat ascendentium ali-"quem et fratres, qui possint cum parenti-"bus vocari, et alterius præmortui fratris fi-"lios, cum ascendentibus et fratribus vocen-"tur etiam præmortui fratris filii, et tantam "accipiant portionem, quantum eorum futu-"rus erat pater accipere, si vixisset." Vid. Nov. cxxvii. cap. 1. *Harris.*

END OF THE INSTITUTES.

NOTES

AND

REFERENCES.

PROEMIUM, OR PREFACE.

DE CONFIRMATIONE INSTITUTIONUM....Page 1.

THIS amounts to an imperial constitution, giving a Sanction, to this compilation by Tribonian and his associates.

In nomine Domini nostri Jesu Christi. This is elsewhere used, as in the second and third confirmations of the digests, in the confirmation of the code, and of several of the novels. *In nomine Domini nostri Jesu Christi, ad omnia consilia omnesque actus semper progredimur. Cod.* 1. 27. 2. *pr.* Hence the usual solemn form of beginning last wills and testaments, IN THE NAME OF GOD, AMEN. That the ancient Romans, seldom entered on a business of importance *sine consilio deorum et ope invocata*, I am aware; but I suspect this practice, was rather of Christian origin: 3 Coloss. 17. "Whatever ye do in word or deed, do all in the name of the Lord Jesus, giving thanks to God, and the father by him." See Dr. Taylor's observations on the proemium of the Institutes, Elem. Civ. Law. qto. 28. This form of testamentary introduction, cannot be necessary, unless under some precise and positive institution; of which I know none in the English or American law. I refer to Taylor, (loc. cit.) for a full dissertation on the titles assumed by the emperor, of which the following is a concise account.

Emperor. Imperator. Originally conferred on victorious generals, but first assumed as an imperial title by Augustus Cæsar.

Cæsar. A name that belonged to the family of Julius Cæsar as a Cognomen; and adopted by the emperors from Augustus to Nero. It was then given to the next in succession *(destinati imperio)* who were denominated *nobilissimi Cæsares:* it was reassumed by the emperors, on the removal of the government from Rome to Byzantium.

Flavius. Borrowed from the Vespasian family, and retained by many of the emperors after Vespasian; it was then dropt for some time, and reassumed by the fourth predecessor of Justinian.

Justinian. The proper name of the emperor.

Allemanicus, Geticus, &c. From the nations he claimed to have subdued.

Pius. A sir-name or agnomen, first imagined for Tiberius, the heir of Augustus, but not assumed. It was afterwards used by Antoninus and his successors.

Felix. A name which Sylla first took to himself after the death of the younger Marius: among the emperors, first assumed by Commodus.

Triumphator. From having triumphed in consequence of victories over the Persians and Vandals. *Victor* and *Triumphator*, were titles commonly assumed from the time of Constantine the Great. Justinian was also often in camp, saluted CALLINICUS by acclamation: a greek title of the same import as victorious. Triumphator, was never given for the *recovery* of territory, but only when there was accession by conquest. So Q. Fulvius and L. Opimius were denied a triumph, because they only recovered Capua, and Fragellæ. 2 Val. Max. 8. 4.

Augustus. A question arose in the senate, (anno urb. cond. 727) whether the title Romulus, or Augustus, should be conferred on Octavian. From 63 Dion. Cassius, it should seem, he would have preferred the former title, but on the motion of Munatius Plancus, the name Augustus was preferred; and adopted by his successors. Though it was also assumed by several of the imperial family (as by Germanicus) who were not emperors. After the time of Diocletian, it was changed into *Semper Augustus.*

De usu Armorum et legum. Imperiam Majestatem. Majestas, during the time of the republic, meant somewhat like the modern phrase, the majesty of the people: implying the ultimate source of political power. It was afterwards applied to delegated authority, as that of prætors, judges, &c. Then to parental authority when it included the power of life and death: Majestas Patria. xxxiv. Livy. 2. has majestas matronarum: Pliny ix. 60 majestas pueritiæ. When the people by the

lex regia conferred all power on the emperor, the word majestas was applied to the authority they delegated; as *majestas* Augusti, Tiberii, &c. *Imperatoria majestas*, was introduced by Galienus, and from his time continued. (Taylor.)

§ 1. *De bellis et legibus, &c. Barbaricæ gentes.* A name given by the Romans to all other nations but themselves and the Greeks. The five provinces of Africa here alluded to, had been possessed by the Vandals ninety-five years. Cod. 1. 27. de off. Præf. Præt. Af.

§ 2. *De Compositione Codicis et Pandectarum.* In the second year of his reign, A. D. 528, Justinian began his reformation of the law. The Justinian code was finished by Tribonian 529. A new edition *(Codex repetitæ prælectionis)* was published by Justinian in 534. In 530, the Digest was begun. On the 16th December 533 it was finished. The digest is also called the PANDECTS from πας and δεχομαι to include all. Hence the usual reference to the digest *(ff)*: being a careless writing of the greek letter π. On the 21st Nov. 533, the Institutes appeared in their present form.

Quasi per medium profundum euntes. The books then published on the Roman law, amounted to upwards of two thousand κατὰ κοιμηλων πολλων: many camel loads.

§ 3. *De tempore, auctoritatibus, &c. magistro et exquæstore sacri palatii nostri.* Magister Palatii or Officiorum, was an officer, some what, like the lord Chamberlain, or perhaps Master of the Household of England. The officers of the lower ages of the empire were generally called *magistri*, as magistri libellorum, scriniorum, officiorum. Hence the master of the rolls, masters in chancery, master of the Crown office, &c. of the English system. The great officers of the republic, and of the early times of the empire, are described in several titles of the first book of the digest: the officers of the lower empire, in the first and last book of the code.

Exquæstore, is an undeclinable ablative: the other cases, exquæstor, exquæstoris, exconsulis, &c. do not appear to be used. The quæstor of the Palace, was somewhat like the lord Chancellor, *os imperatoris, armarium legum, &c.* That is under the emperors: for the office of quæstor at first, was of the same kind with our secretary of the treasury. (Taylor 38. 228.) Constantine instituted the office of Quæstor Palatii. The Quæsitores or Inquisitors, were magistrates long known, whose jurisdiction embraced only criminal cases. (Zozimus and Procopius de bello Persico.) *Antecessor*, a teacher and professor of law: the *Jurisperiti*, were practitioners.

Post Quadriennium. Five years, seem formerly to have been the

term usually (indeed universally) allowed for the study of the law. For the instructions, as to the division of time allotted for studying the various parts of the civil law, viz. the Dupondii, Edictales, Papinianistæ, Lytæ, and Prolytæ, see the constitution *(omnem republicæ nostræ, &c.)* prefixed to the digests.

§ 6. *Ex quibus libris Noster Caius.* Caius lived under the emperor Marcus Aurelius, and his institutes were read in the schools. Beside the institutes of Caius, there were the institutes of Paulus, of Ulpian, of Callistratus, Florentinus, and Marcian. There were also prior codes, and digests : as the digests of Alfenus, Julianus, Celsus, Marcellus, Ulpian, the Pandects of Modestinus, &c.

Constitutional authority. I have retained Harris's expression, although there may be some ambiguity attached to it in this country, where the term implies something founded on our written constitutions, or fundamental laws, paramount to legislative acts : a distinction, that does not seem likely to last very long, in states where the power of the legislature like the power of the British parliament, is omnipotent. But in this passage, the word must be understood *secundum subjectam materiem*, as alluding to a particular species of Roman law. Inst. L. 1 Tit. 2. § 6. page 9. of the present work.

L. 1. *(page 5.)* DEFINITIO *Justitiæ.* Justice, is used, not only for the disposition to render every man his due, but sometimes also for the act by which this is done : as when we do a man justice.

§ 1. *Definitio Jurisprudentiæ.* This definition is very convenient for the alliance between church and state : an alliance that I hope will never take place in these states. I know of no things that ought to be kept more distinct, because they are so, than the affairs of this world, and those of the world to come : nor do I know of any two things that despotism has so sedulously laboured to intertwine. I would not so construe the old advice, *Deorum Injuriæ Diis curæ*, as to protect gross violations of public decorum on religious subjects, or to pass over, irritating and offensive outrages against the religious opinions, or ceremonies of any persuasion. The defendant in *The people against Ruggles*, 8 Johnson's New York reports, 290, deserved to be punished ; but the doctrine laid down in that case by the court, may be carried to a length, that would authorize any species of ecclesiastical tyranny, and prohibit any kind of religious discussion. Nor is it strengthened by citing cases from the jurisprudence of a country where there is a religion by law established ; or by quoting the present passage from the civil law. It will have little weight with those who have perused the ecclesiastical history of the times of Justinian,

and the three or four centuries immediately preceding, and subsequent. Are we at this day, to regulate the rights of conscience, and modify our system of religious toleration, by the notions of a Roman emperor of the 6th century ? or adopt the church-and-state law of Great Britain ?

Tit. 2. *De jure naturali.* Jus, here, is taken for the general system of natural, national and civil law, in contra-distinction, to the positive laws of each species. I consider all law, of whatever kind, as deduced, either from extensive and long-adopted usage, furnishing presumptive evidence of general expedience—or from reasonings founded on the nature and circumstances of human society, and pointing out the conclusions best adapted to general expedience.

Jus, Jussum, Jura, Jussa, mean a rule of action including an obligation, or duty to conform to it: therein differing from advice.

Or, it may mean an attribute or quality of actions or persons; what we use synonimously sometimes with *right:* as the rights of a conqueror, the rights of war and peace; the right of using, enjoying, suing, defending, &c. the rights of persons, the rights of things, all of which are called *Jura.* Under this meaning, may be included the rights belonging to particular situations in life, as the rights of magistrates and of citizens, master and servant, parent and child, husband and wife, &c.

Or, among the Romans, it might mean the administration of justice. *De in jus vocando.*

The other subordinate varieties of meaning of the word *Jus,* appear to me, all referable to those above enumerated.

The law of nature, and of nations, is collected from, 1st the practice of civilized nations, 2ly the opinions of the best writers on the subject. The writers usually cited in the British and American courts, are Albericus Gentilis, Puffendorf, Grotius with the annotations of Barbeyrac, Vattel, Burlamaqui, Heineccius, Bynkershoek and Rutherforth.

§ 2. *Ab appellatione et effectibus, page 7. Quirinus.* From the Sabine word *Quiris,* a spear: or from *Quiris,* Mars, reputed father of Romulus: or from *Cures, Quires* a Sabine city, which furnished Rome with early settlers. Ovid Fasti II. 475.

§ 3. *Divisio Juris.* See Pandects or Digest 1. 6. 1. de Just. et Jure. *Alterum enim expresse sancitur, et scripto promulgatur: alterum tacito populi consensu introducitur.* See also *ff de leg.* as to written and common law. All this is conformable to the doctrine of the English and American writers. For even in this country, we adopt in every state, all our legal maxims and institutions not contained in constitutional or legislative acts, as the common law of the state. Nor can common law be entirely dispensed with even in the code of the

United States, notwithstanding the very able opinions of Mr. Madison and Judge Chase.

The Romans had six kinds of law; LEX, PLEBISCITUM, SENATUS-CONSULTUM, CONSTITUTIONES PRINCIPIS, EDICTA MAGISTRATUUM, RESPONSA PRUDENTUM.

The *Lex*, was a Populiscitum; or decree of the people, on the motion of a senator, in a meeting of the comitia curiata, or the comitia centuriata.

The *Plebiscitum*, was a decree of the Plebeian order, as distinguished from the Patrician, on the motion of a tribune of the people, in the comitia tributa. Plebs was a part only of the people.

Senatus Consultum: this was originally either an order, vote or resolution, on business appertaining to the senatorial body: or some act of the senate confirming some act of the people; or latterly under the emperors, when the *comitia* were transferred *e campo (martio) ad Patres*, these senatorial acts, were the only remains of legislation left to the senate.

Constitutiones Principis. Placita. Decreta. Imperial constitutions.

Augustus Cæsar, having contrived to make not only all actual authority, but almost all offices centre in his own person, became at length the sole lawgiver. *Sexto demum consulatu (a. u. c. 725.) potentiæ securus, dedit jura, queis pace et principe uteremur III. Tacit. Ann.* 28.

Sometimes the imperial constitutions were promulgated, *mediante senatu;* this was the general course taken by Augustus, at the advice of Mæcenas; in which he was followed by Tiberius. The mode was, to suggest the law, in an oration to the senate. Hence, for some years, the senatus consulta, under the emperors, were *Jura, orationibus Principum constituta.* From the time of Augustus, the *Leges*, the *Plebiscita*, and the *Senatus-Consulta*, properly so called, as originating with the senate, were known no more. After Vitellius, the emperors were accustomed to appoint a Quæstor to make the suggestion in a speech to the senate. What the senate complaisantly decreed upon these suggestions, became a law. After a time, the emperor in lieu of calling upon the senate to decree, claimed the right of decreeing or enacting upon his own authority, the resolutions passed in the senate, on the suggestion contained in the imperial or quæstorial orations: and this was the last stage, the expiring embers of the senatus consulta; in whose place were substituted the edicts of the emperors.

The emperors, enacted laws either by *Epistolæ* or rescripts, by *Decreta*, by *Edicta*, or by *Constitutions*.

The *Epistolæ*, were imperial opinions upon cases of difficulty submitted from the provinces or elsewhere.

The *Decreta*, were judgments given by the emperor in person, in court. Augustus and Claudius, used to sit frequently and long for this purpose.

Edicta, were laws voluntarily enacted by the emperors, *sine Senatu*, but they were generally such as had been sanctioned by usage, or decreed also by the senate.

Mandates, were directions to particular persons.

Interpretations of laws, were also arrogated as within their jurisdiction by the emperors. The two last are of the nature of edicts.

The *Imperial Constitutions*, derived their force at first from the powers conferred on Augustus in 735 A. U. C.: extended afterward to Vespasian and his successors; and about the reign of the Antonines known as the *Lex Regia;* by which the will of the sovereign duly promulgated, was declared to have the force and effect of law. 1 Inst. tit. 2 § 6. The distinction there taken of constitutions, is into personal and general. The personal constitutions, were properly *privileges*, *Lex priva*. These were forbidden by the twelve tables; *Privilegia ne irrogantor*. The same maxim obtained during all the times of the republic. *Vetant leges sacratæ, vetant* 12 *tabulæ, leges privatis hominibus irrogari*. Cic. pro Dom. § 17. These privileges or personal constitutions, were sometimes annexed to the person, and sometimes were real, as relating to some property or estate: so the right accorded to executors under the Roman law, of paying funeral expences in the first place, was considered as a real, not a personal right, being allowed *ex intuitu causæ, non personæ*.

Harris's note on the *lex regia* is as follows. (p. 9 of his translation.) "There has been much controversy concerning this law: vid. *Grav. de Rom. imp. lib. sing. c.* 24 and *Hopp. in Inst.* 1 *h. t.* but the following seems at least to be a probable conjecture. The senate and people conferred various honours on *Augustus* at different times. In the year 724 (A. U. C.) they made him tribune for life. In 727 they exempted him from the coercion of the laws. In 781 he was created perpetual consul; and in 735 a power was given to him either of amending or making whatever laws he thought proper. These and other decrees in favour of *Augustus*, were afterwards generally renewed at the commencement of the reign of every new emperor, as appears plainly from Tacitus, *tum senatus, omnia principibus solita, Vespasiano decrevit Tacit. Hist.* 11. 3. Thus in time, all the several decrees of the senate, by being frequently renewed together, became as it were, one

law, and were called *Lex Imperii* or *Regia:* and they probably gained this title in imitation of the ancient lex regia, by which the Romans conferred the supreme power upon Romulus in the infancy of their state, Liv. lib. 34 c 6. Elementa Juris per Rob. Eden. p. 17."

Edicta magistratuum; seu Prætorum; jus honorarium. Prætor was at first a word synonimous with chief or commander (Cor. Nepos in Miltiade.) The office of Prætor (partaking of the English offices of mayor and recorder) was first created A. U. C. 387. This was the Prætor urbanus, or city-magistrate. In the year A. U. C. 511. A Prætor peregrinus, was appointed, after the model of the Athenian Πολιμαρχω to decide causes, wherein aliens were concerned: though sometimes one man, held both offices either by original election, or subsequent delegation, or by substitution in case of death. (Taylor 211.) The branches of law, were afterwards so divided and subdivided certainly not without reason and foresight, that the Prætors amounted to eighteen in number. They had for the most part equitable jurisdiction. *Jus prætorium, adjuvandi vel supplendi, vel corrigendi juris civilis gratia, propter utilitatem publicam introductam,* Dig. 1. 1. 7. 1.

It was also their duty, at the annual commencement of their office, to publish the forms of proceeding, and the rules of court, (if I may so say) which should operate during their Prætorship. For I do not understand this practice to extend to the *legal* maxims, by which their decision should be guided.

Hence, the *actiones civiles*, were not the same with the *actiones prætoriæ*. In the time of the emperor Hadrian, Ann. 884, a selection from Prætorian determinations was made, called the Perpetual edict, and enacted as part of the Roman law: not from its own authority as jus honorarium magistratuum, but under the sanction of the imperial constitution.

The Prætorian annual edicts or forms of proceeding, were published, on a *Tabula gypso dealbata*, or Album; a board plaistered with gypsum γυψω αλαλιμμενος (the gypsum of the Greeks and Romans was the same with our plaister of Paris, that is a sulphat of lime.)

These *Leges annuæ*, according as their expedience was discovered were continued; and then became *edicta translatitia*. Occasionally also, the Curule Ædiles published edicts, which as their expedience seemed to merit, were also incorporated in the *jus honorarium*. See dig. de Ædilitio edicto. 31. 1. 1. 38. 40. 41. 42.

Responsa prudentum. Many lawyers whose particular application and abilities, had rendered them eminent in the profession, undertook to give answers to such questions as were proposed to them. But

these answers were of no weight in the time of the Republic, not even under *Augustus*, who empowered the lawyers to give their opinions, by a general commission; which yet did not procure them any great authority, Dig. 1. 2. 2. 46. But their opinions grew into considerable credit in the reign of *Tiberius*, who prohibited any person from presuming to give an opinion in matters of law, without a special licence. Still the answers of the lawyers had not the force of the laws, for *Tiberius* in his licences, laid no injunction upon his judges, to regard these answers. It is therefore highly probable that the answers of the lawyers were first considered as law, under *Valentinian the third;* because he confirmed the writings of *Gaius*, *Ulpian*, *Paul*, *Papinian*, and others, nominally; and forbad the judges to swerve from the opinions of these lawyers in points of law: and because many inconveniences arose from the various opinions which even these lawyers gave on the same question, the emperor ordained that the judges should be governed by a majority, and that in case of an equality they should follow the opinion of those to whom *Papinian* adhered, *ubi diversæ sententiæ proferuntur, potius numerus vincat auctorum: vel si numerus equalis sit, ejus partis precedat auctoritas in qua excellentis ingenii vir* PAPINIANUS *emineat.* Cod. 1 Theod. t. 4. l un. de responsis prudentum. (Harris in loc.)

The *Patroni* were for a long time Patricians; gratis advocates, and agents. Their clients were bound to relieve them from captivity if taken, and to portion their daughters. Hence at first, the fee of a lawyer, as the fee of a counsel and a physician yet is, in England, was *quiddam honorarium:* afterwards, it became a profession, and fees were taken, which were regulated by the *Lex Cincia.*

From their vigilant watching over the cases of their clients, they were called *cautores.* Hence Dr. Taylor after Scaliger, fancifully derives Cavilling, *Cavillari*, *Cavilatio*, from *Cavere.*

Such are the various kinds of the Roman or civil law; of which the present book is a summary, containing the general principles that pervade it. Great indeed have been the obligations that Justinian's posterity owed to that emperor, for the laborious, and invaluable digest of law compiled under his auspices. A work that no succeeding age has hitherto equalled. The Russian code drawn up under the directions of the empress Catharine, and the Tuscan code of Leopold, have merit indeed, but they are trifles compared to the great work now under consideration. Something approaching to it, has been attempted by the emperor Napoleon; and the code Napoleon of Cambaceres, as

well as the introductory orations in defence of the leading articles contained in it, have great merit.

The British, and of course the American code, is now becoming what the Roman code was, previous to the labours of Tribonian and his coadjutors: κεφαλαι πολλαι, many cart loads. Cannot the same condensed view be taken of our law, as was taken by Justinian of the Roman, and by Napoleon of the French code? I suspect the generality of the profession are of opinion this cannot be done: I am not so. Half a dozen men of talents dividing the labour, under the superintending guidance of some one person to whom the pen should be ultimately committed, might finish the work in four years, according to my view of the subject: and a consummation it would indeed be, devoutly to be wished.

Tit. 3. *De jure personarum. Aut liberi sunt aut Servi.* It would require a volume to enter into the great question of slavery, which has been well discussed of late years. I would observe briefly,

That throughout the whole of the Jewish History, from the days of Nimrod downwards, there was no controversy, but that captives taken in war could be made slaves, and that their posterity were considered as slaves also. All the patriarchs counted their slaves among their goods and chattels, among their oxen, their horses, their camels, &c.

Slavery among the Jews took place

1. When a man sold himself through poverty, 25 Lev. 39.
2. When a father sold his children, 21 Ex. 7.
3. When creditors seized and sold their insolvent debtors, or their children, 2 Kings c. 4. v. 1.
4. A thief was sold when he could not pay his fine, 22 Ex. 3, 4.
5. Prisoners of war.
6. A Hebrew slave ransomed from a Gentile might be sold to another Hebrew by his master.

But the Hebrews were slaves to the Hebrews for six years only, or until the sabbatical jubilee. 21 Ex. 2. If the slave married however, he could not take away with him his wife and children, which belonged to the master. 21 Ex. 4. If from attachment to the family, the slave refused to be freed at the end of six years, or at the sabbatical year, then his master might bore his ears with an awl before the magistrate, and the slave became bound for life. The Hebrew slaves were treated more as hired servants by the Jews: not so the bondmen procured from among the heathen. But even from the heathen, they were forbidden to acquire a slave by stealth. See 21 and 25 Levit.

The Phenicians, Carthaginians, Egyptians, Greeks, and Romans, all practised slavery without any doubt being entertained of its propriety.

Vendere cum possis Captivum, occidere noli. Hor.

The situation of slaves was very bad in early times. Hector tells Andromache that she will be condemned on the fall of Troy to draw water as a slave: so Euripides introduces Hecuba as chained to the gate of Agamemnon. The Phenicians seem to have been first in the practice of kidnapping; see 14th Odyss. All nations, trading in slaves seem prone to mean and clandestine villanies; it is this spirit that has tempted the British slave traders to practise and encourage the same base method of procuring cargoes. Slaves were very ill treated among the Carthaginians. The abject state of the Helotes among the Lacedemonians has become proverbial.

Slaves were also in a bad state among the Romans. They were frequently chained to the gate of a great man's house as porters.

I copy the following summary of the circumstances of their condition from Dr. Taylor (Elem. civ. Law 429); the authorities are accurately cited.

" Slaves were held *pro nullis: pro mortuis:* how this is to be un-
" derstood consult A. Faber (and Gothofred ad Dig. 50. 17. 32. 209.)
" pro *Quadrupedibus:* nay, were in a much worse state than any
" cattle whatsoever, as the same author (Faber) has shewn. They
" had no head in the state, no name, title, or register: they were not
" capable of being injured: nor could they take by purchase or de-
" scent: they had no heirs, and therefore could make no will: exclu-
" sive of what was called their peculium, whatever they acquired was
" their master's: they could not plead nor be pleaded for, but were
" excluded from all civil concerns whatever: they could not claim the
" indulgence of absence *reipublicæ causa:* they were not entitled to
" the rights and considerations of matrimony, and therefore had no
" relief in case of adultery: nor were they proper objects of cognation
" or affinity, but of quasi-cognation only: they could be sold, trans-
" ferred or pawned, as goods or personal estate; for goods they were,
" and as such they were esteemed: they might be tortured for evi-
" dence: punished at the discretion of their lord, or even put to death
" by his authority: together with many other civil incapacities which
" I have not room to enumerate."

The first law in their favour was the lex Cornelia de sicariis, by which the killing even of a slave became punishable. Dig. 48. 8.

The *jus vitæ et necis* claimed by the master, was restrained by Claudius the successor of Caligula. See also Dig. 48. 8. 2.

In 813 ab u. cond. Nero by the lex Petronia, deprived masters of the power of sending their slaves to fight wild beasts at the public shews.

The Emperor Adrian, prohibited generally cruel treatment toward slaves; and he banished Umbricia a lady of quality, for five years, *quod ex levissimis causis suas ancillas atrocissime tractasset.*

Antoninus Pius, applied the *Lex Cornelia de sicariis*, specifically to the masters of slaves: and the same law was strengthened by Severus and by Constantine. Cod. L. 1. de emendant. serv.

Slaves might always induce an investigation by flying to the statues of the princes. Cod. L. 1 de his qui, &c.

The prevalence of christianity, though neither Christ nor his apostles have condemned slavery, (4 Philem. 11,) contributed gradually but greatly to amend the condition of slaves.

Athenæus (L. c.) says there were several persons at Rome who had ten and twenty thousand slaves: and in VI. 20 he states that at a time when the citizens of Athens were only 21,000, the slaves amounted to 400,000, and that the small Island of Ægina contained 470,000. In Africa, slavery has been established from time immemorial: the Arabs had African slaves, long before the settlements of the Portuguese: and though some additional aggravations have occurred from kidnapping, and incursions made for the express purpose of procuring cargoes, still the Africans, like all the nations of antiquity, were from the earliest ages in the practice of making slaves of prisoners of war: I forbear any discussion of the right of slavery, as a question too metaphysical and abstruse, to be entered upon here. Nor will my view of it, coincide equally with the sentiments of the middle and north eastern, and those of the southern states. In England, the inexpedience of the practice is considered as settled, and there appears but one opinion in that nation on the general subject of the slave trade, which is, that it ought to be abolished. The law respecting slavery is also now fixed. The case of Somerset the negro has determined that no man of whatever colour can be held as a slave in that country. But the abstract question—that which respects the right of reducing a human creature to slavery under any circumstances, has not yet been investigated so profoundly as its importance deserves. But this is not the place to investigate it, nor would it be easy to shake off the bias of previous habits and prejudgments.

After the travels of Park and Hornemann, no man can reasonably pretend that the Africans have a right to complain, who from one end to the other of that quarter of the world, have exercised from the beginning, and still do exercise the right of reducing each other to sla-

very, with concomitant practices full as bad as any that the West Indies can furnish. Knowing these things, I cannot be greatly interested in favour of the blacks.

But I exceedingly regret the prevalence of slavery and the slave trade. All absolute power, has a direct tendency, not only to detract from the happiness of the persons who are subject to it, but to deprave the good qualities of those who possess it. I have no right to say that it makes men careless, unfeeling, and unjust, as to the sufferings of a fellow creature, because these dispositions are very frequently indeed counteracted by the natural good qualities of the master, and by the general manners of civilized society, at a period when kindness and humanity are fostered and respected by public opinion: but the whole history of human nature, in the present and every former age, will justify me in saying that such is the *tendency* of power on the one hand and slavery on the other. Nor can any country be so well cultivated by slave labour, as by the labour of freemen, fairly recompensed; nor can industry be the character of such a state of society; nor can there be any permanent feeling, either of individual or of public security. Hence, I cannot but approve of the prohibition of the slave trade, as one of the steps toward a gradual abolition of the whole system of slavery; a system that greatly detracts from the industry, the improvement, the security, and the happiness of society, wherever it prevails.

In England, the species of slavery termed Villenage, was abolished by 12 Ch. 2. The last case concerning villenage in the books, is that of Crouche, 10th Eliz. Dyer 266. C. pl. 11. So are the Serfs par naissance in France: but under the old regime, there were Serfs held by Mortmain, and Serfs who became so by loss of their heritage: that is under one or other of the signoral customs, or droits feodaux. Such Serfs could not aliene their Serf-tenements, unless to a Serf of the same lord: they could not marry a free person, or the Serf of another lord: they could not put their sons into the clerical profession: they could not make a will to the prejudice of their lord, &c. see 1 Ferriere's Justinian 76. Somewhat of the same kind obtained in Germany, and still more in Poland. At present I apprehend this class of society no longer exists in Europe.

There is no where in the scriptures that I recollect, any direct prohibition of slavery, except as to the bondage of the Jews among themselves; but there can be no doubt, of its being contrary to the general spirit and precepts of christianity, which has contributed not a little to the abolition of villenage, as well as of slavery. In the year 1514, Henry 8th, manumitted two of his villains in the following form,

"Whereas God created all men free, but afterwards the laws and cus-
"toms of nations, subjected some under the yoke of servitude, we
"think it *pious and meritorious with God* to manumit Henry Knight,
"a Taylor, and John Hule a Husbandman, our natives, as being born
"within the manor of Stoke Clymmysland, in our county of Cornwall,
"&c." See Barrington's observations on the statutes, 2nd edition, 249. So, Fitzherbert, in his readings on 4 Edw. 1st, Extenta Manerii, after giving the state of villanage in Henry 8th's time, says that it then began to decrease in all parts of England; and he thinks that no men should be bound but unto God, and that it is contrary to the principles of Christianity. Barrington 251. Robertson, in his hist. of Charles the 5th, v. 1 p. 324, gives a great number of instances and quotations, to prove the frequency of manumission, from a religious principle, together with the forms used on such occasions. Indeed Christianity, greatly contributed in the middle ages, to soften the barbarous manners of the times. Thus a law of Bavaria, for the protection of foreigners in Lindebrogue's collection says, *Si autem aliquis tum presumptuosus fuerit ut peregrinis nocere volucrit, 14 solid. mulctetur. Deus nam dixit (Exod. 21.) peregrinum et pauperem non contristabis de rebus suis.* Barrington, 22. See, also the interesting account of the TREUGA DEI. in 1. Robertson's Ch. 5 p. 343—356. Hence, seems to be derived the clause in our indictment for assault, that the Prosecutor was in the peace of God, and the King.

Sir Thomas Smith, who was secretary of state to Edward, 6, and then to Elizabeth, observes that he never knew of any villains *in gross*, in his time, and that villains appendant to manors (villeins regardant: glebæ adscriptitii) were but very few in number: that since England had received the christian religion, men began to be affected in their consciences at holding their brethren in servitude; and that upon this scruple in process of time, the holy fathers, monks and friars, so burthened the minds of those whom they confessed, that temporal men were glad to manumit all their villains. But he adds, the holy fathers themselves did not manumit their own slaves, and the bishops behaved like the other ecclesiastics. But at last some bishops enfranchised their villains for money, and others on account of popular outcry: and at length the monasteries falling into lay hands, were the occasion that almost all the villains in the kingdom were manumitted. Smith's repub. ch. 10. Harris.

In England, although it was determined that trover would not lie for a negro, because the owner had not such an absolute property in his negro that he might kill him; (Salk. 666. Lord Ray. 1274, Smith v.

Gould) yet trespass *per quod servitium amisit* would lie; and if property were proved in the negro, he would not have been able to maintain his liberty by baptism or residence in England (5 Mod. 182 Chamberline v Harvey) until the great case of *Somerset* the negro, by which it was determined that there could be no slavery in England. See the argument of Mr. Hargrave in that case, in the last volume of his edition of the state trials. Of the supposed efficacy of baptism formerly, the reader may find a very curious case in 3 Mod. 120. Sir Thomas Grantham's case.

Villains (hinds) could acquire no property, for *quicquid acquiritur servo, acquisitur domino*, says my Lord Coke. Co. Litt. 117. C. As to the distinctions relating to the right of the master to wages or earnings acquired by servants or apprentices, see the notes on the above cited passage in Harg. Co. Litt. and 1 Campb. Rep. Nis. Prius 527, Thompson v Havelock. Lord Coke in his note on villenage, deduces (after St. Ambrose) the origin of slavery from the introduction of wine: *non esset hodie servitus, si ebrietas non esset*. Canaan being condemned to bondage for exposing the nakedness of his father Noah.

§ 4. *Quibus modis servi*, &c. *Venundari passus est.* This was permitted also by a senatus consultum in the time of Claudian, though manifestly contrary to the general rule that no man can change his condition on his own authority. Dig. 40. 12. 37. In such cases the person selling himself was required, 1st to be of 20 years of age at least. Ib. L. 7. and Dig. 40. 13. 2ly with certain knowledge of his birth and condition Ib. tit. 14. and Dig. 40. 12 L. 14. et seq. 3ly The purchaser also must act bonâ fide Ib. L. 16. par. 2. and L. 7. par. 2. 4ly. That the price paid was completely at his disposal. L. 1. and 5. Cod. de liber caus. Dig. 40. 13. Dig. 28. 3. L. 6. Cujas adds another condition. 5ly That he should neither be filius familias or manumitted, for he cannot injure the rights of the Paterfamilias or of the Patron. Dig. 40. 12. L. 1. Leo Philosophus abrogated this senatus consultum by his Novel 59.

A freeman might also become a slave, by ingratitude toward his patron, by condemnation to the mines or wild beasts, and so becoming *Servus Pœnæ*. By a senatus consultum Claudianum, a free woman indulging in servile amours might lose her freedom.

Nascuntur ex ancillis nostris. Cujas gives a fanciful analogy. *Eodem jure ex ancillis nati servi sunt, quo sata cedunt solo. Mater enim solo comparatur, vis patris sato.*

§ 5. *De liberorum et Servorum Differentia.* In England the people are divided into 1st The King and heir apparent. 2ly The nobility or

peerage (a) temporal, consisting of dukes, marquisses, earls, viscounts and barons, (b) spiritual, consisting of archbishops and bishops. 3ly The commonalty: consisting of baronets whose titles are hereditary; knights, whose titles are personal only and not hereditary; esquires or gentlemen, acquired by birth, by office, by profession, or by courtesy; yeomanry, tradesmen, artificers and labourers.

In this country, the title of "excellency" sometimes given to the President of the United States, and to governors of states, as well as the title "honourable" bestowed on judges and members of Congress, and "esquire" applied to justices of peace and practitioners at law, I regard as founded on courtesy and custom only. The practice of addressing the president, a governor, or a judge, as an esquire, certainly arises from neglecting the old adage that *omne majus continet in se minus*.

Tit. 4. De ingenui definitione p. 12. By the civil law, children born in wedlock (as in England) followed the condition of the fathers, Dig. 5. 19. If born out of wedlock (contubernio) they follow the condition of the mother. In England, a bastard being nullius filius is in all cases free, the presumption being in favour of liberty: so if a man marry a Nef, she becomes free forever after: and a child born in such wedlock is also free. See all the learning on this subject in Harg. Co. Litt. 123. b.

Tit. 5. Definitio et origo Libertinorum, &c. p. 13. In the early times of the republic *Libertus* was a freed man, and *Libertinus* his descendant. Suet. Claud. 24. 8. Isid. 4. But this distinction fell into disuse.

§ 1. *Quibus modis manumittitur, p.* 14 Liberty could anciently be conferred but three ways viz. by *testament:* by the *census:* and by the *vindicta*, or lictor's rod. This is evident from the following passages in Tully: *si neque censu, neque vindicta, neque testamento, liber factus est, non est liber.* In Top.

A man was said to be *liber censu*, when his name was inserted in the censor's roll, with the approbation of his master at the public census. But the method of acquiring liberty by the *vindicta* was more solemn and formal. For it was necessary that the master placing his hand upon the head of the slave, should say in the presence of the prætor, *hunc hominem liberum esse aio:* to which the prætor always replied, *dico eum liberum esse more Quiritum.* Then the lictor or serjeant receiving the vindicta or rod from the prætor, struck the new freed man several blows with it upon the head, face, and back, after which his name was registered in the roll of freedmen, and his head being close shaved, a cap was given to him as a token of liberty. Harris.

This is not quite accurate. The lictor gave the slave, a gentle blow on the head with the vindicta, and a box on the ear, and made him turn round thrice. Afterward under the latter emperors, in lieu of the census, the master made a public declaration of his intention to free the slave, in church. Slaves were also manumitted by letter, signed by the master in presence of five witnesses: or before his friends, five witnesses being present at the declaration. The enfranchisement by vindicta, might take place before a consul as well as a prætor; and in the provinces before a proconsul, his legate, or deputy. See dig. 1 16. 2. cod. 7. tit. 6. de lat. lib. toll. Ib. l. 1. § 2. de his qui in eccles. and Sigonius l. 1. de antiq. Jur. Civ. Rom.

The ancient form of manumitting villains, was thus. "If any person "be desirous to enfranchise his slave, let him with his right hand de- "liver the slave to the sheriff in a full county, proclaim him exempt "from the bond of servitude by manumission, shew him open gates "and ways, deliver him fire arms, to wit, a lance and a sword, where- "upon he becomes a free man." Harris, from Wilkins' leges anglo-saxonicæ. Afterwards, manumission of villains was conferred by grant and release, of which Harris has given a form from the complete Clerk, 1676.

Alius multis modis. Enumerated cod. 7. tit. 6. de lat. lib. tollendâ.

Tit. 5. § 3. De libertinorum divisione sublata. The three classes of freed men, here mentioned, had different rights attached to their respective conditions.

1st. Freed men of the greater liberty, were Roman citizens with all privileges, but they were obliged to leave a part of their property by will to their patron. They were required to be thirty years of age, and their master twenty, at the time of their manumission by the law Ælia Sentia; and all the usual and prescribed forms were to be strictly observed. If any of these requisites were wanting, the slave became only, 2ly Latinus Junianus, under the law Junia Norbana, enacted 771 in the consulship of Junius Silanus, and Norbanus Balbus; which confined the right of being considered as freedmen of the greater liberty, to those who had been enfranchised, by will, by census, or by the vindicta. These Latini, were not Roman citizens, they died slaves, but during life they enjoyed the other privileges of freemen, see 3 Instit. 8. 3ly, The Dedititii, were persons who, while slaves, had suffered corporeal punishment for some crime, and were named after some tributaries to the Roman people, who had revolted and were compelled to lay down their arms. *Dedititii, quia se suaque omnia dedicerunt.* They could never become Roman citizens. All

these distinctions were destroyed by the constitutions of Justinian. Cod. 7. tit. 5. l. 1 and tit. 6. l. 1. Harris. Ferriere.

Tit. 6. § 1. *De servo instituto, &c. Injuria defunctus afficiatur*, p. 16. It was ignominious for the goods of the deceased to be sold at public auction for debts, see Cic. orat. pro Quintio.

Ib. § 3. *Quid sit in fraudem, &c.* The fraudulent intent may lose its effect in this case: a man knowing himself insolvent, enfranchises his slave: by subsequent acquisition he becomes solvent: the slave in this case continues free.

In the following case, the creditors may lose the slave, altho' there was no fraud accompanying his manumission. A master enfranchises during known and acknowledged solvency. His house and goods are afterwards consumed by fire. The manumission cannot be set aside, for it was fair and legal when made. Ferriere.

In England, there are two statutes made to protect creditors against fraudulent conveyances and devises, 27 Eliz. ch. 4. and 3 W. and M. ch. 14. see Wilson v. Knubley 7 East. 128.

Ib. § 5. *Quæ sunt justæ causæ.* See the 9th and six following laws of the digest, *de manum. vindic.* and the 21st law of the digest *qui et a quibus manum*, that is dig. 40. 3 and dig. 40. 9.

A son might become master of his father, if he had been left heir by a testator, to whom the whole family belonged.

Procurator. Cujas thinks this is only *procurator ad lites*, not *ad negocia. L.* 22 *observ. c.* 16. A mere agent ad negocia, might be under the age of 17. see L. 3. § ult. de minor. (dig. 4. 4) and dig. 14. 3. de Instit. actione.

Tit. 7. § 1. *De lege Furia Caninia.* This was a law passed in the time of Augustus to prevent the city being crowded with idle and disorderly persons. Suet. Aug.

Tit. 8. § 2. *De Jure civ. Rom. in servos.* I have already treated of the condition of slaves among the Romans.

Ad sacram statuam. It was anciently the policy of almost all kingdoms to allow of sanctuaries or places of refuge, and they are said to have been permitted in England almost as soon as christianity was received. In the eighth year of Henry 8th, the following points (which will give the reader some idea of the power of sanctuaries) were affirmed and resolved in the case of *Savage*, to wit: That in England the pope without the king could not make a sanctuary: that sanctuaries must commence with a grant from the king, and then be confirmed by the pope: but that if they began by a bull from the pope, it would be insufficient, although they were afterwards confirmed by

the king: that the general words *Ambitus*, *Præcinctus*, *Clausura*, in such grants, whether papal or regal, did only include the church, cloister, dormitory and church yard, but did not extend to the gardens, barns, stables and the like: that sanctuary *de jure communi* was only for forty days (which was a privilege belonging to all parochial churches and church yards) and that sanctuary for life, or as long as the person pleased (which was an usual privilege of religious houses) depended upon special grants, which were to be well proved, or otherwise were null and void. Keilway 188. Gibson's Codex 1188.

Sanctuary never extended farther in civil cases, than to save the body from execution. In criminal cases, it did not extend to treason; but it did to murder and other felonies. 2 Hawk. Pl. Cr. 32.

Sanctuaries lost much of their privileges by 22. Hen. 8 ch. 19. 27. H. 8. ch. 19. 32. Hen. 8 ch. 12. and ch. 20. and they were entirely abolished by 21 James 1. ch. 28. see Middleton's letter from Rome. 113. (Harris).

Major asperitas dominorum. In England the lord might rob, beat and chastise his villain at will, but was not allowed to maim him: for then, the villain might have had an appeal of mayhem against him. *Le seigneur poit rob, naufrer, et chastiser son villein a son volunt. Salve qu'il ne poit lui maim, car donques il avera appel de mayhem envers lui. Termes de la Ley.*

Tit. 9. *De patria potestate, p.* 22. Anciently fathers had the power of life and death over their children. This was restrained by Trajan who directed emancipation in cases of great severity. *L.* 1. *of the Dig. si a parenti:* and by Adrian *L.* 5. *of the Dig. de Leg. Pomp. de parricid:* and by Alexander Severus, *L.* 3. *Cod. de patria potest:* so Ulpian *de Adulteris: Inauditum filium pater occidere non potest, sed accusare eum apud præfectum, præsidemve provinciæ debet.*

A man might acquire the rights of a father by marriage, legitimation and adoption.

As to the right of a father to the acquisitions of his child, See post. Inst. l. 2. tit. 9.

Tit. 9. § 1. *Definitio nuptiarum.* Marriage in this passage is termed indiscriminately *nuptiæ* and *matrimonium.* There are other terms also applied to marriage, as *Connubium, Conjugium, Consortium, Contubernium, Concubinatus.*

Matrimonium, originally meant the union of male and female for the purpose of procuring offspring. *Maris et fœminæ conjunctio*, as the 2nd Tit. of the Institute has it. *Nuptiæ* strictly means, the marriage ceremony. Hence the expressions *Justum matrimonium*,

Justæ nuptiæ, meaning that kind of marriage and marriage ceremony, which was conducted according to law: and as this was matrimony κατ' ἐξοχην, *matrimonium* and *nuptiæ* soon became the popular expressions for lawful marriage.

Connubium, *conjugium*, *consortium*, are metaphorical synonimies for lawful matrimony. *Connubium*, a mutual submission to the marriage ceremony, from *nubendo* i. e. *tegendo*; it being the custom of the bride to cover her head with the *flammeum* or veil. Dr. Taylor deduces it without sufficient reason as I think, more distantly from a Hebrew root used 27. Is. 6. signifying procreation, production. *Conjugium*, a mutual yoke. *Consortium*, a mutual lot in life; *for better for worse*, as the English Church ceremony, properly states it.

The *Contubernium* was the matrimony of slaves, a permitted cohabitation; not partaking of lawful marriage, which they could not contract. It was applied also to other kinds of unlawful connection. Cod. 2. 21. 4. Cod. 5. 5. 3. Cod. 5. 5. 9. Cod. 6. 59. 9. Hence there was no process of adultery in favour of a slave. Cod. 9. 9. 23. Dig. 48. 5. 6. But although civil forms might be disregarded in *Contuberniis*, the laws of nature as to incestuous commerce, were held in full force, for the reason assigned in Inst. 1. 15. 3. See also dig. 23. 2. 14. 2.

Concubinatus. Semi-matrimonium: conjugium inequale. A full description of this may be seen in the last title of dig. 25. The Greeks also allowed of this left-handed marriage, as I believe it is called in Europe: παλλακία. Not. ad Demosth. C. Nearchi T. III. p. 624. Concubinage was entered into before witnesses, otherwise it became prostitution, dig. 25. 7. 3. The parties might dissolve the contract and cohabitation at pleasure, dig. 25. 7. 1. It did not admit of adultery. dig. 25. 7. 6. As marriage was discouraged between officers of state in the provinces, and female inhabitants of the same province, they were permitted to take concubines of the province. Ib. l. 5. dig. 23. 2. 38 and 57. and Cod. *si quacumque prædict potest.*

Concubinage was regulated by Constantine. Cod. 5. 26. *unic.* 7. 15 ult. and Justinian, Nov. 18. 74. and 89. *Concubina est mulier libera inupta quam vir cælebs domi concubinatus causa solam habet.* That the man should be unmarried, was not required by the old or prior laws relating to concubinage, but the woman only. All that was formerly required of the man, was, that he should be at least twelve years of age, dig. 25. 7. 1. and that he should not have more concubines than one. Concubinage, was abolished by the emperor Leo. Nov. Leo. 91.

Concubinage, I understand obtained not many years ago in Germany,

if it do not at this day. I do not enter at large into the marriage ceremonies of the Romans; they may be sought in modern compilers, Rosinus, Adams; but after Dr. Taylor, I shall notice the three kinds of lawful marriage among that people.

Marriages were *solennes*, solemn; or *minus solennes*, less solemn. The *solennes* were either USU, FARRE, OR COEMPTIONE.

Marriage, *Usu*, by prescription, is briefly described by Servius, in his commentary on 1 Virg. Georg. 31. and 18 Aul. Gell. 6. When a woman cohabited with a man for a whole year, with a view to matrimony, *(matrimonii ergo,)* she became his property by prescription, under a law of the 12 Tables. Till the year was expired, she was *uxor*, *matrona*, but not *materfamilias*. An absence of three nights would break the prescription, or *usucapion*; this interruption was *usurpatio*.

This seems to have been the oldest form of Roman marriages.

Marriage, *Farre: Confarreatio*. This was the most solemn form of marriage among the Romans: by it, a woman became copartner with her husband in all his sacred rites, and in all his substance, and was his sole heir at his death, if he died without children. Dion. Halic. l. c. If he left children, she succeeded to equal portions of his estate. The children were *patrimi*, and *matrimi*, and had peculiar privileges; certain priests, and the vestal virgins being chosen from among them. 4 Tacit. ann. 16. 1. Aul. Gell. 12. The ceremony could not be performed without the presence of the *Pontifex maximus*, or the *Flamen Dialis: Servius* in 1 Georg. It was attended with the ceremony of the parties mutually breaking together a cake, *Farra*, *Panis farreus*. Ten witnesses were necessary. *Ulpian* tit. 9. § 1. It was dissolved by a similar ceremony, *Diffarreatio*. It fell into disuse, about the time of *Tiberius*, 4 Tac. ann. 16.

Marriage, *Coemptione:* or by mutual purchase. The man and the woman delivered to each other a small piece of money. *Servius ad* 4. Virg. Æneid. 103. Cic. orat I. 57. The man asked the woman, will you become to me a mother of the family? To which she replied, I will. In her turn, she asked, will you become to me a father of the family? and he answered, I will. The woman then delivered her piece of money and herself, into the hands of the man. Until this period, and preceding the *Domi ductio*, the woman was *sponsa* only: after the *Domi ductio*, the marriage was compleated. Dig. 35. 1. 15.

Coemptio, was also called *conventio in manum*. The wife stood in point of heirship to the husband, in place of a daughter.

Among the Romans, the foundation of marriage was the CONSENT of

the parties. *Consensus, non Concubitus, facit nuptias.* Dig. 50. 17. 30. Dig. 35. 1. 15. Dig. 24. 1. 32. 13. But this consent, must have been between parties willing to contract, of proper age, (that is 14 for the male, 12 for the female,) free from disabilities of relationship, able to contract, free from precontract, from legal disability, and that consent must have been ratified also by the consent of the parent. Instit. 1. 10. pr. which given afterward by *Ratihabitio*, would not answer the purpose of confirming the marriage. Dig. 1. 5. 11. Ib. 23. 2. 65. 1. Ib. 48. 5. 13. 6. But latterly a subsequent confirmation seems to have been valid: Cod. 4. 28. 7. Without this consent, the issue were illegitimate. Inst. 1. 11. 7. In cases of insanity or captivity, the consent of the parents was not necessary. L. 35. Cod de nupt. L. 28. Cod. de Episcop. aud.

In England both by the canon law, (canons of 1603. Can. 62. 63. 100. 101.) and the statute law, the consent of parents is required: the want of it indeed, did not avoid the marriage, but the minister who married them was punished by 7 and 8. W. 3. ch. 35. But by the marriage act of 26 Geo. 2. ch. 33. beside punishing the minister, the marriage is declared void in many cases where the requisites of that act are not complied with. The general train of chancery decisions, is also much in favour of devises *on condition of marriage with consent of Guardians, &c.* See 1. Fonb. 246. 1st n. edit. or L. 1. ch. 4. § 10. n.

The legal prohibitions were PARENTAGE, *(Parentela)* RELATIONSHIP, PUBLIC DECORUM, RANK, POWER and AGE: of which in their order.

Parentage: Cognation: Consanguinity. The connection of persons descended from a common parent or stock. Strictly, *Cognati*, are relations by the mother's side: *Agnati* relations by the father's side. *Adgnati*, or *Agnâti*, include *Cognati*, but not vice versâ. Dig. 38. 10. 10. Dig. 38. 7. 5. So *Arrogati* include the *Adoptati*, but not vice versâ. This cognation may be either natural; or civil arising from adoption; or mixed; of this more in L. 3. tit. 6. post.

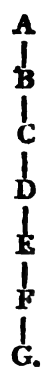
Relationship or affinity. Is the connection between the husband and his wife's parents, and the wife and her husband's parents. *Adfines sunt viri et uxoris cognati; dicti ab eo, quod duæ cognationes quæ diversæ inter se sunt, per nuptias copulantur; et altera ad alterius cognationis finem accedit: namque conjungendæ adfinitatis, causa fit ex nuptiis.* Dig. 38. 10. 4. 3. There are no degrees strictly speaking in affinity, as there are in parentage or consanguinity; but I am considered as related to the parents of my wife, in the same degree that she is. Although affinity takes place between me and my wife's parentage, and

between my wife and mine, yet this does not induce any kind of relationship or affinity, between our respective parents or *consanguinei*; for their situations in society, ought not to be affected by our contracts. Hence *comprivigni* may intermarry. Dig. 23. 2. 34. 3. Affinity therefore can only affect the man and woman contracting. *Affinis mei affinis non est mihi affinis* as *North* said in Oxenham et ux. v Gayre C. B. cited Bac. Ab. tit. Marr. A. 529.

Formerly the Roman law prohibited marriage between persons in direct affinity only, Dig. 38. 10. 4. 6—7. L. 17. Cod. de nupt. but afterward the imperial constitutions forbad it between a brother in law, and a sister in law in the collateral line. L. 5. and 8. Cod. de Incest. et Inut. Nupt. 1.

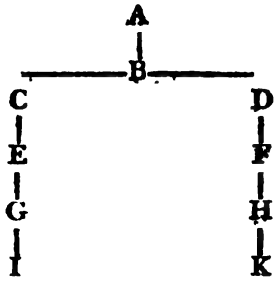
The general rule is, *Quocunque gradu, quis uni conjugum junctus est consanguinitate, eodem gradu junctus est alteri affinitate.* Thus, I cannot marry my wife's daughter or my wife's mother, because they are to my former wife in the ascending and descending line of consanguinity; and therefore to me in the ascending or descending line of affinity.

Perhaps the prohibitions of the civil and of the canon law, may be explained in a short compass.



In this strait line, the letters respectively over and under each other, denote parent and child: within this line, all intermarriages are forbidden (by the law of nature as is generally agreed) whether ascending or descending. D. cannot marry either A, B or C, or E, F or G. Dig. 23. 2. ult. By this rule, all marriages are forbidden between those who are *in parentum numero*.

The next rule is, that all marriages are forbidden between those collaterals who are *in parentum Loco*. This is the *respectum Parentelæ*.



C and D, E and F, G and H &c. are collaterals.

Of these collaterals, those who are *immediately under the common stock*, cannot marry any person in the opposite collateral line.

Thus D is immediately under, or next to the common stock B. Hence D cannot marry with C, E, G or I. For like reason C cannot marry with D, F, H or K.

The next rule is that with respect to other collaterals as E and F, G and H, I and K, they may marry after the third degree, counted by the civil law mode of computation: which begins not with, but from the party in question on the one side, and counts through the common stock, to the party in question, on the other side; or leaving out the common stock, and including the parties on both sides. Thus, in what degree of relation, are E and F who are first cousins? In the fourth: and they may marry. For C counts one; B two; D three; F four. In what degree of relationship are I and H? Answer G one; E two; C three; B four; D five; F six; H seven. The prohibitions of intermarriage between collaterals, extend by the civil law to the fourth degree, EXCLUSIVE, according to the above mode of counting. Hence first cousins by the *civil* law, being in the fourth degree may intermarry.

The *Canon* law computes, not by counting upwards, then through the common stock, and then downwards to the *propositus*—but beginning at the common stock counts downward on either line, taking the longest when one is longer than the other. Thus E and F, or first cousins, are in the third degree: B one; C two; E three; or, B one; D two; F three. Hence marriage between first cousins is forbidden by the *Canon* law, whose prohibition extends to the fourth degree of Canon law computation INCLUSIVE. Of course, not only first, but second cousins are forbidden to intermarry by that law. The more numerous the prohibition, the more profitable were dispensations. Hence the present mode of

computing canonical degrees was introduced by Pope Alexander 2nd. By the old canon law and the early decretals, marriages were forbidden as far as the seventh degree, answering to the 12th of the civil law: this was reduced to the fourth degree of canon law computation (inclusive) by the council of Lateran 1215. But Dr. Taylor says it was so in England, as appears by some constitutions he examined of Oswald, archbishop of York, in the 10th century. The English, and we after them, adopt generally the civil law regulations on this head. Blackstone's table of consanguinity, L. 2. ch. 14. P. 203. is well calculated to illustrate the comparison of the two modes of computation.

The following table, is taken from Burn's ecclesiastical law, tit. marriages.

A man may not marry his

Secundus gradus in linea recta ascendente,	
Cons. Avia.	1 Grandmother.
Affin. Avi relicta.	2 Grandfather's wife.
Affin. Prosocrus, vel socrus magna.	3 Wife's grandmother.
Secundus gradus inæqualis in linea transversali ascendente,	
Cons. Amita.	4 Father's sister.
Cons. Matertera.	5 Mother's sister.
Affin. Patrui relicta.	6 Father's brother's wife.
Affin. Avunculi relicta.	7 Mother's brother's wife.
Affin. Amita uxoris	8 Wife's father's sister.
Affin. Matertera uxoris.	9 Wife's mother's sister.
Primus gradus in linea recta ascendente,	
Cons. Mater.	10 Mother.
Affin. Noverca.	11 Step mother.
Affin. Socrus.	12 Wife's mother.
Primus gradus in linea recta descendente,	
Cons. Filia.	13 Daughter.
Affin. Privigna.	14 Wife's daughter.
Affin. Nurus.	15 Son's wife.
Primus gradus æqualis in linea transversali,	
Cons. Soror.	16 Sister.
Affin. Soror uxoris.	17 Wife's sister.
Affin. Fratris relicta.	18 Brother's wife.

Secundus gradus in linea recta descendente,

Cons. Neptis ex filio.	19 Son's daughter.
Cons. Neptis ex filia.	20 Daughter's daughter.
Affin. Pronurus, i. e. relicta nepotis ex filio.	21 Son's son's wife.
Affin. Pronurus, i. e relicta nepotis ex filia.	22 Daughter's son's wife.
Affin. Privigni filia.	23 Wife's son's daughter.
Affin. Privignæ filia.	24 Wife's daughter's daughter.

Secundus gradus inæqualis in linea transversali descendente,

Cons. Neptis ex fratre.	25 Brother's daughter.
Cons. Neptis ex sorore.	26 Sister's daughter.
Affin. Nepotis ex fratre relicta.	27 Brother's son's wife.
Affin. Nepotis ex sorore relicta.	28 Sister's son's wife.
Affin. Neptis uxoris ex fratre.	29 Wife's brother's daughter.
Affin. Neptis uxoris ex sorore.	30 Wife's sister's daughter.

A woman may not marry with her

Secundus gradus in linea recta ascendente,

1 Grandfather.	*Cons. Avus.*
2 Grandmother's husband.	*Affin. Aviæ relictus.*
3 Husband's grandfather.	*Affin. Prosocer, vel socer magnus.*

Secundus gradus inæqualis in linea transversali ascendente,

4 Father's brother.	*Cons. Patruus.*
5 Mother's brother.	*Cons. Avunculus.*
6 Father's sister's husband.	*Affin. Amitæ relictus.*
7 Mother's sister's husband.	*Affin. Materteræ relictus.*
8 Husband's father's brother.	*Affin. Patruus mariti.*
9 Husband's mother's brother.	*Affin. Avunculus mariti.*

Primus gradus in linea recta ascendente,

10 Father.	*Cons. Pater.*
11 Step-father.	*Affin. Vitricus.*
12 Husband's father.	*Affin. Socer.*

Primus gradus in linea recta descendente,

13 Son.	*Cons. Filius.*
14 Husband's son.	*Affin. Privignus.*

15 Daughter's husband.	*Affin. Gener.*
	Primus gradus æquælis in lina transversali,
16 Brother.	*Cons. Frater.*
17 Husband's brother.	*Affin. Levir.*
18 Sister's husband,	*Affin. Sororis relictus.*
	Secundus gradus in linea recta descendente,
19 Son's son.	*Nepos ex filio.*
20 Daughter's son.	*Cons. Nepos ex filia.*
21 Son's daughter's husband.	*Affin. Progener, i. e. relictus neptis ex filio.*
22 Daughter's daughter's husband.	*Affin. Progener, i. e. relictus neptis ex filia.*
23 Husband's son's son.	*Affin. Privigni filius.*
24 Husband's daughter's son.	*Affin. Privignæ filius.*
	Secundus gradus inæqualis in linea transversali descendente,
25 Brother's son.	*Cons. Nepos ex fratre.*
26 Sister's son.	*Cons. Nepos ex sorore.*
27 Brother's daughter's husband.	*Affin. Neptis ex fratre relictus.*
28 Sister's daughter's husband.	*Affin. Neptis ex sorore relictus.*
29 Husband's brother's son.	*Affin. Leviri filius, i. e. nepos smariti ex fratre.*
30 Husband's sister's son.	*Affin. Gloris filius, i. e. nepos mariti ex sorore.*

The Levitical degrees are to be found in 18th and 20th chapter of Leviticus, and they are these: see Haines v. Jescott 5. Mod. 168. 1. Ld. Ray. 68. where the Levitical degrees are tabulated in a somewhat different order, following lord Coke.

A man may not marry

His mother
His sister
His son's daughter
His daughter's daughter
His father's wife's daughter
His father's sister
His mother's sister
His father's brother's wife
His son's wife

His brother's wife
His wife's daughter
His wife's sister.

The preceding are the prohibitions of the 18th chapter.

The following are from the 20th chapter, and *may be* intended to embrace second marriages.

His father's wife
His wife's mother
His father's or mother's daughter
His father's or mother's sister
His uncle's wife
His brother's wife.

The above mentioned table of kindred and affinity, (from Burns) therefore, is made up, not from the specific enumeration of prohibited degrees in the book of Leviticus, but from the *principle* that seems to guide the Jewish prohibition, viz. to the *third* degree of the Jewish and civil law computation inclusive: for the Jews, calculated degrees in the same way as the Romans did, viz. from the *propositus* exclusive, up to and through the common stock, and down to the other party in question inclusive. 1 Selden's uxor Hebraica ch. 4. The English law allows marriage at the fourth degree, as computed by the Jewish and the civil law. *Harison et ux. v. Dr. Burwell*, Vaug. 206. 2 Ventr. 9. Gibs. Cod. 412. The prohibited degrees are not specified in 32 Hen. 8. ch. 38. which declares that all persons may lawfully marry, except such as are prohibited by God's law, but they are in the preceding statutes of 25 H. 8. c. 22. and 28 H. 8. c. 7. but Burns Eccles. Law II. 405. doubts whether the two last statutes are in force since 32 H. 8. ch. 38. the spiritual courts are confined to the Levitical degrees, Vaugh. 206. *Harrison et ux. v. Burwell.*

I have made a doubt whether a man may marry his wife's sister, *his wife being dead*, from the expression in the passage in Levit. "Thou shalt not take a wife to her sister *to vex her*," but in *Hill v. Good*, Vaugh. 302. and Carth. 271. 3 Keble, 166. Gibs. 412. it was determined that this case fell under the general prohibition of verse 6. including all that are near of kin: a decision indirectly confirmed by Collet's case T. Jones 213. Nelson's Ab. tit. Marr. 1158,1159. 15 Vin. 256. and lately by the court of arches in England (1811,) agreeably to former cases. Indeed the cases where marriage with a wife's sister's daughter has been deemed incestuous, are numerous. Most of them are collected in 4 Bac. Ab. 529. see Mr. Butler's note Co. Litt. 235. 2. 2 Burns ec-

cles. law 414. et seq. But it is not forbidden by the law of Pennsylvania, see act of 1705 as to Incest.

Mr. Christian in his note 4. to 2 Blacks. 206. is right when he says "I do not know a single instance in which we have occasion to refer to the canon law: but the civil law computation is of great importance in ascertaining who are entitled to administration, and the distributive shares of intestate property." See also 2 Bl. Comment. 504.

The following terms of affinity, collected in one view, may assist the reader's recollection.

Socer: a wife's father: Beau Pere.
Socrus: a wife's mother: Belle Mere.
Noverca: a step-mother: a father's second wife: Belle Mere.
Vitricus: a step-father: a mother's second husband: Beau Pere.
Nurus: a daughter-in-law: a son's wife: Bru.
Gener: a son-in-law: a daughter's husband: Gendre.
Comprivigni: children by a former marriage.
Privignus: son of a wife by a former marriage: Beau fils.
Privigna: daughter of my wife by a former marriage: Beau fille.
Uxoris fratri: wife's brother: brother-in-law: Beau frere.
Uxoris soror: sister-in-law: wife's sister: Belle sœur.
Fratria: brother's wife: sister-in-law: Belle sœur.
Levir: Brother-in-law to the wife: Beau frere. δαηρ.
Glos: sister-in-law to the wife: Belle sœur. γαλως.

Linea ascendens.
Pater: Mater: father: mother.
Avus: Avia: grand-father: grand-mother.
Proavus: Proavia: great-grand-father: great-grand-mother.
Abavus: Abavia: great-grand-father's father: great-grand-father's mother.
Atavus: Atavia: great-great-father's grand-father: great-great-father's grand-mother.
Tritavus: Tritavia: great-great-father's great-grand-father: great-great-father's great-grand-mother.

Lin. descendens.
Filius: Filia: son: daughter.
Nepos: Neptis: linealis: grand-son: grand-daughter.
Pronepos: proneptis: linealis: great-grand-son: great-grand-daughter.
Abnepos: Abneptis: linealis: son or daughter of the above.
Atnepos: Atneptis: linealis: son or daughter of the above.
Trinepos: Trineptis: linealis: son or daughter of the above.

Agnati.
- *Patruus:* uncle by the father's side: father's brother.
- *Amita:* father's sister: aunt by the father's side.
- *Patruus magnus:* / *Amita magna:* } great-uncle: great-aunt by the father's side.
- *Propatruus magnus:* / *Pro-amita magna:* } father and mother of the above.
- *Abpatruus magnus:* / *Abamita magna:* } grand-father and grand-mother of the great-uncle and great-aunt on the father's side.
- *Patrueles:* (à patruo) sons and daughters, cousin-germans on the father's side.
- *Amitini:* (ab amitâ) the same descended of the father's sister.

Cognati.
- *Avunculus: Matertera:* mother's brother: mother's sister: maternal uncle and aunt.
- *Avunculus magnus:* maternal great-uncle.
- *Matertera magna:* maternal great-aunt.
- *Proavunculus magnus:* great-uncle's father on the mother's side.
- *Promatertera magna:* great-uncle's mother, on the mother's side.
- *Ab avunculus magnus:* grand-uncle's grand-father, / *Ab materera magna:* grand-uncle's grand-mother, } on the mother's side.
- *Avunculini:* / *Materterini:* } cousin-germans on the mother's side.

Nepos and *Neptis* are properly grand-children: but these terms are also applied to nephews and nieces: *Præterea, nepotem ex patre aut ex sorore, a Juris-peritis imperite dici, admonent eruditi; nam fratris aut sororis filius dici solet e doctis, nepos autem respectu avi, ut filius respectu patris dicitur. Joh. Calvini Lexicon Juridicum sub voce Nepos.* In this *imperitiore sensu*, lord Coke uses it: see his table of consanguinity and affinity Co. Litt. 18. Hence

Nepos: Neptis:
Pronepos: Proneptis:
Abnepos: Abneptis:
Atnepos: Atneptis:
Trinepos: Trineptis:
} *collaterales:* { Mean nephews and nieces and their lineal descendants.

This application of the term *Nepos*, may perhaps be authorized by the expression of Caius, Dig. 26. 4. 7. and in L. nemini 17. Cod. de nupt. but in both passages it is ambiguous.

The distinction of linealis and collateralis, takes away the ambiguity. No doubt, the more accurate expression for a nephew or niece, is *fratris vel sororis filius vel filia.*

The next in number among the legal prohibitions to marriage among the Romans, was, offence against *Public decorum.*

Justinian post § 9 states three cases of prohibition, 1st, The daughter of your wife after divorce. 2ly, The affianced wife of a son, though not a daughter-in-law: for the Romans had their *sponsalia* or pre-contracts, as well as marriage contracts. The *consensus sponsalitius*

was one thing: the *consensus matrimonialis* another. Taylor 303. 3ly, The affianced wife of a father, though not a mother-in-law. These were, *quasi privigna, quasi nurus, quasi novercа.* These cases are taken from Dig. 23. 2. 12. To these enumerated by Justinian, may be added, 4thly, an adopted daughter or grand-daughter emancipated. Dig. 23. 2. 55. 5ly, Between an adoptive emancipated son, and a woman who has been the wife of the adoptive father. Dig. 23. 2. 14. 6ly, An adopted son, and the mother of an adopted father, so long as the adoption continues. Ib. L. 55. par. 1.

Another head of legal prohibition was *Rank*, of which see post § 11. As if a senator should contract matrimony with a manumitted slave, a stage player, or any other person of lost reputation. Dig. 23. 2. 44. but this was abrogated by Justinian, Nov. 78. c. 3.

Another subject of prohibition was *Power*. As in the cases of, 1st, A tutor and his female pupil: a curator and his female minor. Dig. 23. 2. 59. et seq. and Cod. de interd. Matr. 2ly, A governor of a province and a female native resident therein. Dig. 23. 2. 38 and 57. and Cod. si quacumque prædit. potest.

The last prohibition arose from *Age*. As marriage between a man of 60 and a woman of 50. Dig. 1. 7. 15. 2. Dig. 19. 1. 21. Cod 6. 58. 12. See hereon, Heineccius ad Leg. Jul. et Pap. Popp. But these prohibitions were much moderated by Justinian, except as to widows. Cod. 5. 4. 27. Cod. 6. 58. 12.

Polygamy, common among the barbarous nations of antiquity (barbarous in the Greek and Roman sense of the word) the Germans excepted, Tacit. de Mor. Germ. ch 18. was also occasionally permitted among the Greeks, when necessity seemed to require it; as in the case of the detachment of young men from the army of Lacedemon, mentioned by Plutarch; and by the Athenians διὰ σπάνιν ἀνδρῶν *propter hominum infrequentiam*. Arist. de Nobilit. ex Athen. 80. L. 13. init. and by the Tuscans, 12 Athen. 3. and it was defended by Eurip. in Ino. tragæd. and by Plato, whose doctrine was rather a community of wives like that of the Arreoi in Otaheite, than a plurality; see also Aul. Gell. xv. 20. xviii. 2. Aristotle well considers Plato's doctrine in his politics, book 2. § 2 4. "A work (as I most cordially agree with "Dr. Taylor) which I will venture to pronounce one of the most "sterling productions of antiquity, and a most inexhaustible treasure "to the statesman, the lawyer and the philosopher." (Taylor 342.) The english reader is much indebted to Dr. Gillies for his view of Aristotle's philosophy.

Socrates indulged in two wives, if not in pederasty which he is in-

troduced as speaking of in Xenophon's memorabilia, in his conversation with Alcibiades, as a thing of common course. The general reputation of this man, ranks with me among the literary paradoxes: but I most wonder at the praise bestowed on him by my deceased friend (the first man of his day in the philosophical and literary world) Dr. Priestley.

That the Jews practised polygamy, and that their laws regulated it, is well known, Deut. 21. 15. 17. In the year 1780 the Rev. Martin Madan published his "THELYPTHORA;" in which, taking for granted that the axiom of the canonists, *Concubitus non consensus facit nuptias*, is founded on scripture, he proposed the introduction of licensed polygamy in cases of female seduction, as a remedy for prostitution. He was a man of learning, but a religious fanatic, of the sect of Calvinist-methodists. His arguments are deduced principally from 21. Deut. 15. 18. 22. Deut. 28, 29. 22. Ex. 16, 17. He notices very truly that marriage was first introduced among the *Sacraments*, and put under the custody of the priesthood, by Pope Innocent the third. He refers particularly to the cases of Hannah, Rachel and Bathsheba, who are mentioned in the bible in terms of respect, as well as Joseph, Samuel, and Solomon, who were the issue of polygamous marriages. Madan built and officiated at the Lock chapel which was annexed to the Lock hospital for venereal patients, near Hyde-park corner, in London. He was the composer of that fine tune "Before Jehovah's awful throne:", and the compiler of the best collection of popular church music now known, for the use of that chapel.

The civil law forbad polygamy. Inst. 1. 10. 6. Dig. 3. 2. 1. par. 8. Dig. 40. 2. 15. L. 2. Cod. de incest. et inut. nupt. Cic. de orat. 40. and even *bina sponsalia*, Dig. 3. 2. 1. fin. Polygamy was introduced by Valentinian first, as appears from Socrates, Nicephorus, Paulus Diaconus, and Jornandes, see the citations in Taylor, 347: but it did not continue long. But licensed concubinage amounted to it, which seems to have continued for many years. Heinecc. ad leg. Jul. et Pap. Poppœam, Dig. 25. 2. 11. sub. fin. and Julius Cæsar is said by Suetonius to have instigated Helvius Cinna the tribune, to introduce a law in favour of unlimited polygamy. Suet. in Jul. Cæs. § 52.

Concubinage however was discouraged by the digest, 32. 49. 4. and the law prohibited concubinage, at the same time with matrimony, as well as more concubines at a time than one. Dig. 45. 1. 121. Cod. 5. 26. unic. Cod. 7. 15. ult. Nov. 18. 74. and 89.

Christianity, has settled the question of polygamy among christians, notwithstanding the practices recorded in the old testament. 1 Corinth. ch. 7. and has settled also the subordinate situation of the wife:

herein conforming to the law of nature as it appears to me. For generally speaking, there is a natural prevalence of mental energy, as well as of corporeal force in favour of the man, independent of the means of acquired knowledge. But by discouraging fornication, and by denouncing polygamy and concubinage, christianity has greatly tended to ameliorate the situation of women in society, and thereby to civilize society itself. I am glad to see the wavering decisions of the British courts brought to something like system by the case of *Marshall* and *Rutton*, 8 Term Rep. 545. I consider the very able argument of judge Hide in *Manby v. Scott*, 1. Mod. 129. (notwithstanding some harsh observations) as embracing the soundest principles upon this subject, and placing the relative situation of the two parties upon the best footing for each of them, and as being most in unison with the law of England, the precepts of christianity, and the dictates of natural reason and civilized expedience. I apprehend it also to be conformable to the general spirit of the laws throughout this country. In Great Britain, the courts, as I think, instead of looking with a jealous eye upon every kind of pre-contract that tends to impair the unity of interest between married people, and the dependance of the wife upon the husband, have leaned somewhat too strongly in favour of pre-contract by marriage-settlement, trust-estates, testamentary powers to be exercised by the wife, and by enforcing equivalent settlements on the receipt after marriage of a wife's property.

As to marriage contracts of infants, and espousals *per verba de præsenti, et per verba de futuro*, and Scotch and other foreign marriages, see Harg. Co. Litt. 80. a. n. 2 H. Blacks. 147. 10 East. 286. and 1 Johns. cases in N. York 424. 2 Burr. 1079. and 2 Burns Eccles. Law, 401. 420. where the subject is discussed at length.

In speaking of marriage, it may not be improper to say a few words on the subject of DIVORCE among the Romans. Justinian in this section of the Institutes, defines marriage to be *Viri et mulieris conjunctio individuam vitæ consuetudinem continens:* in conformity to the digest 23. 2. 1. *Conjunctio maris et Fœminæ; consortium omnis vitæ; divini et humani juris communicatio.* Expressions, which must be referred to the intent of the parties at the time. It was (so far as I know) reserved for the English law to take cognizance of a pre-contract, in which the parties contemplate the possibility of a separation in express terms, and make it one of the considerations of the Deed. This was done in *Rex v. Meade*, 1 Burr 542. and *Rodney v. Chambers*, 2 East. 283. I am sincerely glad these cases have been shaken by the lord chancellor in *St. John v. St. John* 11 Vez. Junr. 526.

I am well aware, that different states of civilization require different principles of legislation on this, as well as on every other subject; that the considerations arising from the Institutions of hereditary rank, the privileges of primogeniture, and the importance attached to accumulated property, may require the admission of marriage settlements, jointures, trust-estates, and most of the many other complicated regulations which croud the law books of England; but I know of no state of society in which the laws ought to weaken the public sentiment of the indissolubility of the marriage contract, unless upon urgent necessity, grounded upon facts judicially established. But to sanction the foresight of adultery, cruelty, or desertion, upon the very face of the marriage contract, is to sanction the crimes themselves.

Upon the subject of divorce, see Dig. 24. 2. Cod. 5. 17 and 24. and Nov. 22. and 117. Caus. 28 Quæst. 1 and 2. Grotius II. 5. 9. Puffend. VI. I. 21 et seq. Selden's Uxor Hebraica. See also Code Civil Napol. avec les Discours, Rapports, et Opinions, &c. Tom. 1. from page 329 to 432. where the subject is well discussed.

It has been said that *Repudium* is the proper expression for the dissolution of the *sponsal contract* or espousals; and *Divortium* for the dissolution of the *Marriage* contract. Dig. 50. 16. 101. and 191; but *Repudium* is used synonimously with divorce in Dig. 24. 2. 2. as it appears to me from the expressions employed; and certainly in Cod. 5. 17. 8. and Nov. 22 15. and elsewhere.

Divorce, seems not properly applicable to a judicial decree declaring an unlawful marriage, void ab initio; for persons cannot well be said to be divorced, who were never legally married. But it is used exclusively in this sense in the English law, wherein divorce *a vinculo matrimonii* can only take place by authority of the courts, in cases where the marriage was originally void from objections of consanguinity, affinity, or impotence: for by the marriage act of 26 Geo. 2. precontract, has ceased to be of the number of causes that would induce a Divorce *a Vinculo Matrimonii*. The other divorces for matter subsequent to marriage, operate only a separation *a mensa et thoro*. In cases even of Adultery, the party complaining is driven to parliament for redress.

In the time of Romulus, if we may believe Plutarch (in vit.) a husband might dismiss his wife at pleasure; and in the case of adultery, or intoxication, he had the power of putting her to death, as was done by Egnatius Mecenius, who was acquitted by Romulus for it: not pardoned (condonatus) but acquitted, (absolutus.) Nay, it seems to have been a just cause of divorce if the wife drank any strong liquor. Hence

perhaps the custom of " saluting the Bride :" for Tertullian in his apologet. P. 7. fol. says *Idcirco et oscula propinquis offerre necessitas erat ut spiritu judicarentur (i. e. Uxores.)* To this purpose there are many authorities.

Antiently, the husband alone enjoyed the privilege of divorce; forbidden by Romulus to wives. In the time of Cicero however, and probably long before (Juv. Sat. 9. and Mart. 1. Ep. 41.) the wives appear to have exercised this right; thus Cælius writes to Cicero that Paula Valeria had divorced herself from her husband, the day of his return from the Province, and was to be married to D. Brutus: this too without assigning any reason, *sine causa*. 8. Famil. 7.

For a long time, the disputes between husband and wife were settled on a hearing before mutual relations. Dion. Halic. II. 25. Valer. Max. II. 1. 8. Suet. Tib. 35. &c. This kind of interposition sometimes took place on the exercise of paternal jurisdiction. Liv. II. 41. Val Max. V. 8. 2. V 9. 1. &c. &c.

It is said on many authorities (Dion. Halic. II. 25. Aul. Gell. Noct. Att. IV. 3. Plutarch in Numa et Lycurgi. Vit. et in Quæst. Rom. 14.) that no divorce took place at Rome, from the founding of the city for 420 years till Spurius Carvilius Ruga, divorced his wife for barrenness: for which he was much blamed. The practice of divorce however, for good causes, for trifling causes, and for no cause at all, soon became common. Sulpicius Gallus divorced his wife because he had seen her abroad with her head uncovered, Val. Max. VI. 3. 10. Pub. Sempronius Sophus, because his wife had been at a shew without his knowledge. Ib. n. 12. Quint. Antistius Verus, because he saw his wife conversing with a woman of low condition. Ib. n. 11. Marc Antony because he suspected his wife of an intrigue. Plut. in Vit. Ant. Julius Cæsar, because he would not have his wife to be suspected. Plut. in Vit. Jul. Cæs. Augustus, because he did not like his wife's temper. Suet. in vit. Another wife, because he quarrelled with her mother. Ib. Claudius dismissed one, for trifling faults, *levibus offensis*. Suet. in Vit. Presently it became the fashion both with husbands and wives, to dismiss each other without assigning any reason. These were repudiations and divorces *bona gratia; sine causa; sine querela; sine causa sontica.* Dig. 24. 1. 62. Dig. 40. 9. 14. 4. Nov. 22. 4. and 98. 2. 2. see also, cases relating to the wife's fortune, where the woman procured the divorce in Dig. 24. 3. 4. and 38. This practice was attempted to be restrained by Augustus (Suet. in vit.) but without effect. Seneca III. de Benef. 16. says that women now reckon their age, not by their years, but by their husbands; and Juve-

nal (no friend to the sex) *fiunt octo mariti quinque per autumnos* VI. 228.

Divorces however, by the law Julia de Adulteriis, required to be made with certain formalities *certo modo*, Dig. 38. 11. and were to be attested by seven witnesses of the age of puberty, Dig. 24. 2. 9. and certain forms of words were employed. *Iforas mulier. Tuas res tibi habeto, agito. Ædibus facessi.* so Juvenal, *Collige sarcinulas (dicit libertus) et exi.* VI. 146. Bag and Baggage, according to the homely expression of the English. See Dig. 24. 2. 2. 1 and 2.

In the Repudium, the words were *Condicione tua non utor.* Dig. ub. sup. *Conditio*, is properly applicable to some state or condition previous to marriage: and sometimes for a treaty of marriage, as Dr. Taylor has shewn in several instances Justinian prohibited all divorces unless on account of chastity, Nov. 17. 10. and ordained that the children should not be prejudiced, Nov. 117. 7. 8. By what forms (certis modis) the marriage that took place *Ab Usu*, by a years cohabitation, was dissolved, I do not find. The marriage by *Confarreatio*, was dissolved by *Diffarreatio*. The separation in consequence of divorce, was *Discidium*; and the *Tabulæ nuptiales* (attestation of the marriage as I construe it) and *Dotales* (marriage articles, settlement of jointure) were broken: the keys taken from the wife (*Claves adimebantur*) and the forms of expression above stated or some of them were used toward her. If the husband was absent, he sent his wife a bill of divorce *nuncium remittebat*: this was *matrimonii* RENUNCIATIO. Divorces were recorded in the public registers (Acta.)

Widows could not marry within ten months of their husband's decease. L. 2. Cod. de sec. Nuptiis. See Taylor's elements. Civ. Law. 348. et seq. and Adam's Roman Antiquities 468. where the preceding and additional authorities are collected.

The following causes of divorce I have translated from Cod. 5. 17. 8. Nov. 22 15. and 117. 8.

A man may repudiate his wife, if she be 1st an adultress. 2ly a sorceress, 3ly a man slayer, 4ly a kidnapper, 5ly a robber of sepulchres, or 6ly of churches, 7ly if she harbours thieves, 8ly or goes feasting with strangers, without the knowledge or against the consent of the husband, 9ly or walks out at night, against his inclination without justifiable reason, 10ly if she frequents the circus, the theatres, or the places where combats of wild beasts are shewn, against the directions of her husband, 11ly if she attempts her husband's life, by weapons or by poison 12ly if she conceals treason, or 13ly commits perjury (or brings false accusation) against her husband, or 14ly attempts to beat

him. So far the Theodosian code, confirmed by the 22nd Novel, ch. 15. The 117th novel ch 8. adds as causes of repudiation—if the wife bathes with strangers without the knowledge of her husband, or goes to public places of amusement without his knowledge, or absents herself from home against his consent, unless at the house of her parents.

A woman may repudiate her husband, 1st For adultery, 2ly Homicide, 3ly Sorcery, 4ly Treason, 5ly Perjury, *(crimen falsitatis)* 6ly Robbery of sepulchres, 7ly or Churches, 8ly Theft, 9ly Harbouring thieves, 10ly Bringing home prostitutes, 13ly attempting his wife's life, 14ly Beating (Flogging, *Flagellis)* her. The 117th novel ch. 9. adds, If the husband conceals his knowledge of any other person attempting her life: if he be accessary to another's attempt to debauch her: if he accuse her of adultery and fail in the proof.

The crime of drinking wine, seems to have been abandoned at this time as a cause of divorce: nor is any mention made of impotence on the one hand, or sterility on the other: or of age, disease, banishment, vows of chastity, or monastic orders. In Nov. 22. 13. Deportation, and inter diction from fire and water, are declared not sufficient causes for dissolving matrimony: in the succeeding chapter is also condemned the licence of a wife to take a second husband, if her first being in the army has sent her no information respecting himself during four years. This term is extended to ten years; and she is required to have made diligent enquiries after him.

I say nothing of the laws of Greece on this subject; except generally that in Sparta, divorces were very difficult, in Athens very easy. I refer to the Greek antiquities of Potter and Du Bos. Among the Jews according to Selden's uxor Hebraica, III. 17. old age, ugliness, and ill humour, were causes of divorce in a wife: so according to 24. Deut. 1, was uncleanness. That people did not permit the privilege of divorce to wives. 15. Jos. antiq. 11 and 18 Ib. 7 and 20 Ib. 15. In England, divorces are reasonably difficult, but the rights of infants seem to me superabundantly attended to, when the issue of an adulterous commerce, whereon divorce is adjudicated by the legislature, is still considered legitimate as to all the rights of succession to the estate of the injured father.

It is very much the fashion, (not void of foundation indeed) to abuse Napoleon Buonaparte. It were much to be wished that the fashion equally prevailed, of imitating the many wise acts of that extraordinary man. The subject of divorce appears to me to be better settled in the Code Napoleon, than in any other system of laws ancient or modern; and the general subject is well handled in the pre-

liminary discourses of the orators on that occasion. In this country, the facility of divorce by management, is almost equal to that under the Government of France during the revolution. The case of Jackson v. Jackson, 1 Johnson's New-York Rep. 424 is warranted by sound law, and public expedience.

In Pennsylvania, the legislature of late years, have not only miserably wasted their time in debating and deciding on particular cases (such as convicted felons) which might easily be embraced by a general law, but they have deliberately interfered with cases (ill usage for instance) notoriously within the jurisdiction of established courts. This wanton waste of the time and money of the people, this needless interference with judicial authority, and this facility given to applications for divorce, appear to me great public evils: and arising from a deeper and more systematic plan of absorbing all kind of jurisdiction, and of course all power into the legislative, than is consistent with honest views to the public good. Some of the cases in which this interference has taken place, are irresistibly ludicrous: see for instance the act to dissolve the marriage between Jacob Mayer and Catharine his wife, passed 28 March, 1808, which I presume the compiler of the index was ashamed to insert under the usual head of divorces.

§ 3. *Qui sunt in potestate.* In what cases the court will interfere to deliver a child whether bastard or legitimate into the custody of the father or the mother, see the *King v. Soper.* 5. Term Rep. 278. The *King v. de Manneville*, 5. East 221. The *King v. Mosley*, 5. East 224. note. The *King v. Hopkins and wife* 7. East 579.

Lib. 1. *Tit. X. De nuptiis* page 23. In the last note but one, I have nearly exhausted all I had to observe on marriage, relationship and divorce: to which I refer.

§ 2. *De fratribus et sororibus. p.* 24. See 18. Lev. 19. Deut. ch. 27. L. 17. Cod. h. t. Dig. 45. 1. 35. 1. The Athenians and Egyptians, permitted the marriage of brothers and sisters. Cor. nep. in Cim.

Filium emancipare. Otherwise the marriage would be dissolved, as brothers and sisters cannot marry. Theophr.

§ 3. *De fratris et sororis filia vel nepte.* The prohibition extends in England and here also I presume, to marriage generally with an illegitimate relation within the levitical degrees. Haines, v. Jeffel or Jescott. 1. lord Ray. 68. 5 Mod. 168. Comb. 356. This was the case of a bastard daughter of a sister: and it falls within the reason of the case of the daughter of a divorced wife by a second husband in section 9. of this title.

Cujus enim filiam, &c. Quere. I may not marry my aunt, my

grand-mother's daughter, but I may marry my cousin who is her daughter. Hence these words must be understood as *cujus enim fratris vel sororis filiam.* Ferriere in loc.

§ 4. *De Consobrinis.* P. 25. The marriage of cousin-germans *(sobrinarum) diu ignorata* says Tacitus, in the speech he puts in the mouth of Vitellius, whom Claudius employed to defend his marriage with his neice Agrippina. 12 Ann. 6. But this was not true: see the case of Ligustinus 42 Liv. 34. Theodosius the great, forbad the marriage of cousin-germans by a constitution not extant, which was confirmed in substance by Arcadius law 5. of the Theodosian *code, de incestuis nuptiis,* who afterwards repealed his own and his father's law by L. celebrandis 19. Cod. de nuptiis. In the west, Honorius forbad the marriage of cousin-germans L. 7. Cod. Theod. Si nupt. ex rescript. pet. After the death of Justinian, the law of Theodosius was established again. Hence the law *celebrandis* 19. *Cod. de nuptiis* has been retrenched from the Theodosian Code. These fluctuations of the principle, that the 4th degree is not prohibited, most probably depended on the foresight of the benefit of dispensations.

§ 5. *De Amita* 25. The aunt by the father's side, *matertera* being the aunt on the mother's side. In this section, the adoptive paternal aunt is forbidden, but not the adoptive maternal aunt. The reason is, that adoption being the work of the paternal father only, it draws with it agnation or relationship on the father's side only. Dig. 38. 8. 1. 4 and dig. 1. 7. 23. *nec avunculus nec matertera per adoptionem fieri possunt* Dig. 23. 2. 12. 4. Hence a man might marry the daughter of an adoptive sister, but not of adoptive brother. For the former follows the family of the natural father of the sister, but the father of the latter hath become allied by adoption. Matertera in Dig. 23. 2. 55. 1. should be struck out. Ferriere.

§ 12. *De pœnis injustarum nuptiarum. Constitutionibus.* Decurions, because the curia or senate of the Colonies was supposed to consist of the tenth part of the people: that is at the beginning. Dig. 50. 16. 239. Harris.

The Decurions were a kind of provincial senators and regulated all the public business of the place they lived in. It was an honourable, but an expensive and troublesome employ. This legitimation *per oblationem curiæ* introduced by Theodosius the younger, entitled the son to succeed to the father, but did not draw with it agnation. Lex 3. Cod. de natur. lib. L. 9. Cod. eod. Nov. 89 ch. 2 cum seq. The last sentence of this section is of difficult meaning, for where was the necessity of granting by law the rights of legitimation to legitimate

children? Ferriere thinks it relates only to the case of a child in ventre sa mere, at the time of marriage; which otherwise would have taken its civil state from the time of conception.

A third method of legitimation by imperial rescript, was introduced by Justinian, Nov. 74. c. 2 and 89 and c. 9. and 10.

Nec non is, qui, &c. By a constitution or canon of Pope Alexander, the third, it was enacted, "that children born before the solemnization "of matrimony might nevertheless become legitimate by the subse- "quent marriage of their parents. And in consequence of this canon, "all the bishops of England in the reign of Hen. 3rd, petitioned the "lords, that they would consent that all such who were born before "matrimony, should be legitimate, as well as those who were born af- "ter matrimony, in respect of hereditary succession, inasmuch as the "church accepteth all such as legitimate." But all the earls and barons with one voice answered that they would not change the laws of England, which had hitherto been used and approved. Stat. Mert. 20 Hen. 3 Co. Litt. 245. or 2 Co. Inst. 97.

Tit. XI § 1. *Divisio adoptionis p.* 28. Adoption was of two kinds, 1st. simple adoption of a filius familias, 2ly, adoption by rogation of a pater familias; so called because the parties were asked *rogantur*, if they were content so to do. The former took place before magistrates, Dig. 1. 7. de adoptionibus, Aul. Gell. noct. att. L. 5. c. 19. The latter by imperial letters Dig. 1. 7. 1 Aul. Gell. ub. sup. Cod. 8. 48. Ferriere. (Ferriere's other references to the Digest and the Code, do not support this position.) Adoption forms no part of the law of England: but if a person takes the the child of another to bring it up, and (in popular language) adopts it as part of the family, the person thus adopting stands in *loco parentis*. Thus in *Edmonson v. Machell* 2 Term Reports 4 an aunt recovered damages *per quod servitium amisit* for debauching her niece. So also in *Irwin v. Dearman*, 11 East 23. damages of the same kind were given to a man who had brought up the daughter of his friend. This may be called a quasi adoption. Bracton L. 3 ch. 29. mentions another kind, viz. where a husband rears and educates his wife's bastard, he shall be considered as heir to the husband on presumption that he might have been legitimate: *hæres judicabitur, eo quod nascitur de uxore, dum tamen præsumi possit quod poterit ipsum genuisse.*

§ 2. *Ex nostra constitutione. Vid. Cod. 5. 27. 10. De naturalibus liberis.*

Non extraneo. That is, any person out of the direct line: for persons adopted by an uncle or great uncle, are considered in the same light as if adopted by a stranger. Vinnius.

§ 3. *De arrogatione impuberis*, p. 29. *Bonorum* means not merely goods and chattels, but estate and property, Law 208. Dig. de verbor. signif. and L. 2. Cod. eod. This fourth part became due as a debt after the decease of the adoptive father, and might be recovered by a *condictio de lege*, Dig. 37. 6. 1. 21. The adoption of *impuberes* was first allowed by Antoninus Pius, provided it was under the authority of imperial letters. By *Impuberes* are here meant, not boys under 14 and girls under 12, when they were at liberty to contract matrimony, but the ages of 14 and 18. See post. § 4 of this Title.

§ 9. *Si is qui generare, &c. Spado*, is one who is incapable of procreation; and the disability may arise either from a permanent cause, as castration, or a temporary one. Dig. 23. 3. 39. 1. Dig. 28. 2. 9. The prohibition in the other case, founded on the silly reason that a man who could not naturally be a father, could not be so by adoptive fiction, was abrogated by Leo, Nov. 36.

§ 10. *Si fœmina adoptet.* They might be arrogated by imperial rescript. Dig. 1. 7. 21. But the adoptive fiction was restrained here also at first: because even children by marriage could not take the name or come under the power of the mother. The emperor Leo, Nov. 26, permitted women who never had children, and even unmarried women to adopt.

§ 12. *De servo adoptato. Nostra constitutione:* viz. Cod. 7. 6. 10. de lat. libert. tollend.

Tit. 12. *Quibus modis jus patriæ potestatis solvitur*, p. 33. There are some curious cases in the English books on the doctrine of filial emancipation, as connected with parochial settlement. *The King v. Tottington*, Caldecot. Sett. Cas. 287. *The King v. Broad-Hembury.* H. 25 Geo. 3. 2 Const. 55. 10 East, 91. *The King v. Witton cum Twambrooke*, 3 Term. Rep. 355. wherein Lord Kenyon's opinion is corrected in 10 East, 90. *Rex v. Sowerby*, 2 East, 276. *The King v. Roach*, 6 Term Rep. 247. *Rex v. Woburn*, 8 Term Rep. 479. *The King v. the Inhabitants of Cowhoneyborne*, 10 East, 88.

§ 1. *De deportatione.* Deportation was banishment for life: attended with the loss of civil rights and forfeiture of property. Relegation, was banishment for years, without the loss of civil rights. Dig. 48. 22. throughout. And so is the law of England, vid. Co. Litt. 133, throughout.

In what cases the replication of Exile, Relegation, Banishment or Abjuration, on the part of a woman suing as feme sole is necessary, see *Bagget v. Frier et al.* 11 East, 301, where the principle of *Marshall and Rutton*, 8 Term Rep. 545. and *Chambers and Donaldson*, 9 East,

471. are recognized. The terms exile, relegation, and banishment however, are not to be found but in the marginal abstract.

§ 3. *De servitute pœnæ*, p. 34. Slaves of punishment, as having no certain or specified master. This kind of servitude was abolished by Justinian, Nov. 22. 8.

§ 4. *De dignitate.* See Cod. 12. 3. 5 de Consulibus. Nov. 70. by which emancipation was annexed to the consular, episcopal and some other dignities.

Patriciatus dignitas. In Livy's time, this belonged to the children of ancient senatorial families: but on the removal of the seat of government to Byzantium, this title was confined to persons chosen by the emperors as counsellors of state after having been Curule Ædiles.

§ 5. *De Captivitate et postliminio*, p. 35. The paternal power was only suspended during captivity. Dig. 14. 6. ult. Dig. 49. 15. 12. 1. The captives had a right to two fictions of law in their favour. 1st The *jus postliminii;* by which the period of captivity was merged, and the captive on his return, entered into all his rights, as if he had never been absent. Dig. 38. 16. 15. Dig. 14. 6. 1. 1. Dig. 26. 1. 6. ult. But he could not change or set aside, acts legally performed in his absence. Dig. 4. 6. 19. 2ly The Lex Cornelia, regarded those who died in captivity, as having died the moment preceding their captivity. L. 6. Cod. de poss. rev.

§ 6. *De emancipatione*, p. 35. By the law of the 12 Tables, a son was free when his father had sold him three times. *Si pater filium ter venumduit, filius a patre liber esto.* The three-fold sale was thus conducted. The father sold his son to a mutual friend, who paid him a piece of money *(Sestertius)* in the presence of five witnesses, and of the *Libripens* or scale-holder. The purchaser then held the son as a slave. He then enfranchised him by the Vindicta; whereupon the son being free from slavery, again returned under power of his father, who in the same manner sold him a second time. He was then enfranchised a second time; sold a third time to the father (for otherwise, the seller had he manumitted him, would have been entitled to the rights of a patron) who liberated him in the usual manner.

The parties to this proceeding *(Emancipatio per æs et libram)* were the father *Pater:* the friend, *Pater fiduciarius:* the *Libripens* or balance-holder: the *Antestator*, or person who summoned the witnesses &c. 1 Hor. Sat. 9. v. 76: the witnesses *Testes.* The process *mancipatio; manu traditio;* by the words *mancupo tibi hunc filium qui meus est.* The purchaser holding up the money, said *hunc ego hominem ex jure Quiritium meum esse aio, isque mihi emptus est hoc ære, æneaque libra*

(brazen scales) and striking the scales with the money, paid it over to the pater or natural father. When all was ended, the son became *libra et ære liberatus*, *Liv. VI.* 14, and *sui juris*. Before coin was common, money was weighed out, and *assis*, *æs*, was a pound weight, *Liv IV.* 60. In emancipating a daughter or grand-child, the same formalities were repeated but once. This process was so troublesome, that at length Anastasius dispensed with the fiduciary sale, and Justinian abolished the ceremony altogether, Cod. 8. 49. 6.

§ *De nepote nato post filium emancipatum*, p. 37. By the civil law, second marriages were discountenanced, but not forbidden. A widow was obliged to wear mourning for her husband ten months, which was the extent of the year under Romulus. Ovid. Fast. I. 27. The year was extended by Numa to 12 months. Plut. in Vit. But the prohibition in cases of widowhood extended only to 10 months notwithstanding; that being the period in which it was supposed a posthumous child might be born: Ov. Fast. I. 33. By the constitutions however of several emperors (Gratianus, Valentinian, Theodosius, &c.) widowhood was extended to the year, and if a widow married *infra annum luctus*, she lost her share of her husband's effects, Cod. 5. 9. unless in case of a dispensation from the Emperor, Dig. 3. 2. 10. But widows were not compellable to mourn for their husbands: that is as I understand it, not to wear mourning, or to go through any forms or ceremonies for that purpose, Dig. 3. 2. 9. the prohibition of marriage under the stated penalties continued nevertheless. The year of mourning, was also the time adopted before the conquest, Co. Litt. 8. a. and by the Saxons: Leges Anglo-Sax. Wilk. 109. 122. 144. But there is no prohibition of marriage to widows at any time after their husband's decease, either by the divine law, the canon law, or the present law of England. 2 Burn Ecc. law, 416.

As to the law in favour of the heir, providing against a spurious posthumous offspring, *De ventre in possessionem mittendo, et curatore ejus*, see Dig. 27. 9. As to the English law *de ventre inspiciendo*, and the time at which a child may be born after access by the English law, to wit, forty weeks, it is fully discussed in Co. Litt. 123. and the notes of the editor thereupon.

§ 10. *An parentes cogi possunt*, &c. p. 37. Emancipation might be compelled by the son, 1st on account of improper severity on part of the father: 2ly If the father ordered the son to do any indecent act: or 3ly If he refused proper nourishment. Dig. 1. 7. 32. Dig. 35. 1. 50. Dig. 37. 12. 5. Cod 1. 4. 12.

And a father might force his son to be emancipated in all cases which would justify disinherison. Dig. 45. 1. 132. with the commentary of Bart. and Mynsych.

Lib. 13. *De Tutelis.* p. 37. Males under 14, and females under 12, *(impuberes)* were Pupills and under Tutors. Minors under 25 (which was adult age by the civil law) were under Curators: even though the males were Patres familias. The father's power extended throughout adult age.

The English law respecting guardians (which does not like the civil law, appoint *Curators* for minors as a separate office) may be found fully and learnedly discussed in Co. Litt. 85 to 90. with Hargreave's notes.

§ 3. *Quibus testamento tutor datur*, p. 38. *Tutores dare*, Because after puberty, curators only can be appointed.

§ 5. *De emancipatis*, p. 39. Because the father having exercised his judgment and discretion, it is deemed evidence of sufficiency. So in England it will require a strong case to authorize the appointment of a receiver against an executor, which however is sometimes done, see 12 Vez. 4 *Anonymous.* and 13 Vez. 266. *Middleton v. Dodswell*, and the cases there cited. The first of these, determines, that poverty alone is not a sufficient ground to authorize the appointment of a receiver over an executor.

Tit. 14. *Qui tutores*, &c. p. 39. This seems contrary to the rule, Dig. 48. 5. 21. by which those who are in the power of another cannot have others under their power. But this must be understood of the same kind of power. A *filius familias* under the power of his father, cannot at the same time have parental authority: but other kinds of authority he may have. It may be enquired, if the son of a family, may be appointed, where is the security, for the faithful discharge of his duty? Answer: 1st, the effects of the *filius familias*, are always bound. 2ly, If the father assent to the tutelage, undertaken by the son, the father is bound. Dig. 26. 1. 7. and 26. 7. 21. 3ly. If the law casts the tutelage, security is required: if it be conferred by testament the testator is deemed a competent judge, in a case, where he is so much concerned on account of his children. Women could not be appointed, except mothers and grand-mothers by special rescript. Dig. 26. 1. 18. Cod. 5. 35. 2, and Nov. 118. 5. In England women may be appointed.

§ 5. *De tutore dato.* See Dig. 26. 2. 6. It is an established rule that words are to be understood in their common and obvious mean-

ing, unless the context absolutely requires another. Dig. 50. 16. 201. Dig. 14. 6. 14. Dig. 23. 2. 59.

This section of Justinian, is referred to by Foster Justice, in *Rex v. Taunton, St. Mary Magdalen*, cited 4 Term. Rep. 798. Whether child includes grand-children, must depend on the context: it does not appear to me that there is any rule precisely settled about it. In *Wythe v. Thurlston*, Amb. 555 *Hussey v. Dillon*, Ib. 604. and *Gall v. Bennet*, Ib. 681. bequest to child, was held to include grand-child. But in *Cooke v. Brooking* 2 Vern. 107. where there was a child and several grand-children, the latter were held not to fall under the term of the bequest. The *King v. Taunton, St. Mary Magdalen*, which was a case under the certificate act relating to the settlement of paupers, Burr. 402, was set aside by Lord Kenyon, in the *King v. the inhabitants of Darlington*, 4 Term Rep. 799. and in *Radcliffe, and Buckley*, where the modern cases are considered, 10 Vez. 195: it is there decided that under a bequest to children, grand-children are not entitled unless the will would be inoperative without them; a point before determined by Lord Alvanley in *Reeves v. Brymer*, 4 Vez. 698.

The other cases relating to the construction of words of this class, in a devise are collected by Roper on Legacies, 8 et seq. and in 6 Cruise on real property, 183, 187.

Tit. 15. § 1. *Qui sunt agnati.* *Agnati*, relations by the male side: *Cognati*, by the female side. Change of civil condition might destroy agnation, Dig. 26. 4. 7. and L. 4. § ult. Cod. de leg. tut. Dig. 38. 10. 10. 2. Dig. 38. 16. 2. 1. The difference between agnati and cognati was done away by Justinian Nov. 118. 4. 5.

By a law of the twelve tables, if a man died intestate without children, the law cast the inheritance upon the agnati. If he left a child, the agnati were called to the tutelage by operation also of law; for the Romans were of opinion the next heir to the pupil was the properest person to take care of the estate, being most interested in it. By a law of Solon, the next in succession was excluded from the tutelage, from suspicion that the pupil was not safe under his care. So by the English law, guardian in socage must be next of blood who *cannot* inherit. Co. Litt. 88. A hard rule. *Dormer's case*, 2 P. W. 263.

Tit. 19. *De fiduciaria Tutela*, p. 46. *Perfectæ sint ætatis.* That is 25 years of age.

Age has been well enough divided into

inority. { Infantia	1—7	Infancy
Pueritia	7—14	Childhood
Pubertas	14—25	Puberty

Majority.	Juventus	25—50	Youth
	Virilitas	50—70	Manhood
	Senium	70—&c.	Old-age.

According to modern notions however, youth can hardly be extended to fifty. Yet I recollect that Julius Cæsar at the age of fifty, is some where called νεανίσκος a young man. The ancients seem to have extended the nominal period of youth longer than the moderns, thus Aristotle regards the age of 37 as the proper time for a man to marry.

The different privileges of different ages by the law of England, is well expressed by Blackstone in his Commentaries. "The MALE at 12 may take the oath of Allegiance: at fourteen is at years of discretion, and may therefore consent or disagree to marriage; may choose his Guardian, and if his discretion be actually proved, may make his testament of his personal estate; at seventeen may be an executor; and at twenty one is at his own disposal, and may aliene his lands, goods and chattels. A FEMALE, also at seven years may be betrothed or given in marriage; at nine is entitled to Dower; at twelve is at years of maturity, and therefore may consent or disagree to marriage; and if proved to have sufficient discretion may bequeath her personal estate; at fourteen is at years of legal discretion, and may choose a Guardian; at seventeen may be executrix; and at twenty-one may dispose of herself and her lands; so that the full age in male and female is 21 years; which age is completed on the day preceding the anniversary of a person's birth, who till that time is an *Infant*, and so stiled in law."

Minority by the French Code, extends also to the age of 21 years. I confess this appears to me a period upon the whole too early to put a young man in possession of all the rights belonging to adult age. Still more objectionable are the privileges given by the English law to intervening ages; as that a boy and a girl of 14 and 12 may consent to marriage; which however is the regulation of the civil law also.

The French provisions as to minority; tutelage, and emancipation are to be found in the 11th law or title, of the code Napoleon.

Tit. 20. *De Atiliano Tutore*, &c. 47. The law Attilia was a plebiscite passed 444. U. C. of the law Julia and Titia there is no certain account. This legal appointment of a Tutor, is somewhat like the appointment of Guardians by application to the Court of Chancery, Ab.ca. in Eq. 260: and the like practice obtains in Pennsylvania. It took place either when there was no legal, or no testamentary tutor, or when the latter had only conditional and qualified powers, or wished to be excused for good reasons, or suffered a change of state, or if the

tutor died, or if he or the pupil were taken captive. Marcus Aurelius appointed two Prætors, whose sole occupation was the appointment of tutors. Capitolin. in Divo Marco ch. 10. But I apprehend, this was in defect not only of *testamentary tutors*, but where in cases of intestacy the *Tutela legitima* did not take place for want of a near agnate on whom it should fall by law.

§ 7. *De Tutelæ ratione reddenda.* By the civil law, an action of Tutelage could not be sustained till the Tutelage expired. Dig. 27. 3. 4. But in England a minor may oblige his guardian to account by prochein ami.

Tit 21. *In quibus causis auctoritas sit necessaria*, p. 49.

The general rules of the Civil law and of the English law for the protection of Infants, proceed on the same obvious principle, that no one shall be permitted to take advantage of the want of experience to which an infant is necessarily subject. But the English law or rather the feudal law, certainly goes to the utmost verge of reason and justice, when it stops the progress of a suit wherein a minor is a party and claims by descent, or defends in debt as heir, by suffering the *parol to demur* until the minor arrive at full age. This was unknown to the civil law where the guardian (whether tutor or curator) might conduct the cause—where a curator might be appointed compulsorily for the management of a suit on behalf of an infant—and where the infant when of age had a remedy against his tutor for fraud or negligence, and a minor had the same right of suing his curator even during his minority. This indeed is the case in England, where also the Guardian may be sued by prochein ami. See 14. Vin. Ab. 198. 2. Cro. 640. *Simpson and Simpson v. Jackson*, wherein it was determined that an infant may sue by prochein ami, but must defend by guardian. The same right of suit in favour of infants obtains in this country also. See *Parsons v. Mills et al.* 2 Massach. Rep. 80.

I apprehend that strictly, the law of Pennsylvania, will admit the parol to demur in the same cases with the English law. For although in suits where an infant is defendant and no guardian appointed, the court on motion will appoint the clerk of the court, or any indifferent person a Guardian *pro lite*, yet this no more interferes with the law respecting the parol demurring, than the same practice in England under *Shipman and Stevens*, 2 Wils. 50. Moreover, I apprehend the general law of England on this head, is judicially recognized in Pennsylvania, as the judges of the supreme court have adopted one of the exceptions to it, to wit, 6 Edw. 1 ch. 2: but they have not noticed

another, viz. the stat. of west. 1st: 3 Edw. 1 ch. 46. See 3 Binn. 601. 602. app.

Even by the old law, the parol did not demur, in dower, or quare impedit, or waste, where the remedy was required to be speedy, nor in partition, where no title was involved: and until the act of assembly of Pennsylvania, giving new form and subsance to the action of ejectment, it might have been doubted, whether any suit in this state could arise, wherein the question could be made whether the parol should demur. But now by act of 21 March, 1806, the action of ejectment is so formed, that it differs only from a real action, in as much as one verdict is not conclusive.

As to the appointment of guardians pro lite, it might be made a question whether the laws establishing the orphan's court could enable the bench there to appoint compulsorily a guardian pro lite to appear in another court, and whether any other court has power to appoint to such a guardian. But the practice seems to authorize it.

With respect to the other states, I am not able to give precise information on this head.

In Virginia indeed, it is declared by an express law of 1797, ch. 98. that the parol shall not demur in any suit on account of infancy. 3 Tucker's Blackstone, p. 300. n. Their practice in common cases is to appoint a guardian *pro lite* on motion, with notice to the infant. *Fox v. Cosby*, 2 Call's Virginia reports, p. 1.

The cases relating to the privilege of infancy, may be collected from that title in Co. Litt. with Hargreave and Butler's notes, and Williams's Saunders, as to real property. The cases bearing on their civil contracts, are well collected by Bacon, in his abridgment; by Espinasse, in his Digest; and in Comyn's law of contracts. The body of chancery decisions, must be sought for in the ch. reports under that head, where among other cases relating to infancy, the rights of wards in chancery and female infants generally, are protected with an assiduous severity, carried to the full length of public expedience. If the hands of husbands be so tied up by chancery, as effectually to prevent their wasting the property acquired through the wife, their exertions for the improvement of their common fortune, are also cramped—creditors are misled by the appearance of opulence to trust the husband beyond the funds they can ultimately apply to—and women are carefully instructed in rights and interests, separate from those of their husbands. The state of society may require these protections and precautions, but it is a state of society not to be envied, in this respect at least.

Since the preceding compilations, it seems to be decided in *Williamson v. Watts*, 1 Camp. C. Rep. et Nis. Pri. 552. That although an infant may give a single bill without a penalty for necessaries and bind himself, he cannot give a bill of exchange. Although the single bill is out of use in England, it is not so here.

The provisions of the French code, respecting tutelage and the interests of infants, will be found in the references under the article *Mineur.* Recueil. Tom. 2. Titres 8, 9 & 10.

The following are the principal cases I have found in American reporters, as to the contracts of infants.

In 1 Dall. 166. *Silver v. Shelback:* it was decided that the appearance of an infant to a suit brought against him, is not a judicial act, and is fatal on error: and unless in certain cases of real actions, judgment against an infant will be reversed at full age.

Stansbury v. Marks, 4 Dall. 130. Infancy may be given in evidence on *non assumpsit* in *Pennsylvania*, owing to the intermingling of common law and equity jurisdictions in that state.

Hart v. Hosack, 1 Caines N. Y. Rep. 26. An infant of 14 years put on trial with a physician, cannot at his own will become a student, so as to charge his parent with the student's fee.

Court will not discharge an infant out of custody on that ground only, where no fraud is suggested; but will leave him to use infancy in his defence. *Clemson v. Bush*, 3 Binn. 413.

Weed v. Ellis, 3 Caines, 253. The guardian of an infant may arbitrate on behalf of his ward: and the plea of performance will bar the infant at full age.

Van Winkle v. Ketcham, 3 Caines, 323. The note of an infant given in course of trade cannot be enforced against him.

Conroe v. Bridshall, 1 Johns. N. Y. Rep. 127. An infant at the time of executing a bond, alledged he was full age: yet the bond was held void as against him.

Jackson ex dem. Renselear v. Whitlock, Ib. 213. Whether an infant can be disseized, and then bound to bring his action within ten years of his coming of age?

The plea of infancy can be pleaded by or on behalf of the infant only: it is a personal privilege. *Van Bramer v. Cooper impleaded with Van Bramer*, 2 Johns. N. Y. Rep Same point decided in *Hartness v. Thompson and others*, 5 Johns. N. Y. Rep. 160. In such a case where there are several defendants and one of them an infant, the plaintiff may enter nol. pros. against the infant and proceed against the rest, or the jury may find for the infant, and against the other defendants.

Whether the deed of land by an infant to A, is avoided by his deed for the same land to B, when he is at full age? *Jackson ex dem. Dunbar et al. v. Todd*, 6 Johns. N. Y. Rep. 257. *Knapp v. Crosby*. 1 Massach. Rep. 476. Judgment cannot be taken against an infant who does not appear by Guardian.

In re Augustus le Forrestiere. 2 Mass. Rep. 419. Can an infant be naturalized in this country on his own petition? or on that of his guardian?

1 Washington's Virg. Rep. 299, *Buckner v. Smith*. An infant gave a bond for a gaming debt: on arriving at full age he promised to pay it: held that he was bound. 2 Hening and Munford's Vir. Rep. 289. *Fitzhugh v. Anderson et al.* Infancy does not stop the act of limitations.

Tabb et al. v. Archer et al. 3 Hen. and Mun. 400. Infants may contract by marriage articles which they cannot set aside on arriving at full age. Indeed, those articles enure to the benefit of the children who may be the first of that marriage. Harris and M'Henry's Maryland Reports, Vol. 1. p. 459. *Lane and Gover*. Infant defendant appearing by guardian, in ejectment, is liable to process for costs.

Ib. p. 67. Infant, and those claiming under him, not diverted by the cancelling of a part in chancery, if he was not made a party.

Ib. 152. Infant not barred by an adverse twenty years possession. *Cheseldine v. Brewer*.

Ib. 568. Infant feme sole bound by a marriage settlement at semble.

Tit. 23. *De Curatoribus*, p. 58. These agreed with tutors in that they might be appointed by the same magistrates, were held to security, might be excused or removed for good reasons, assigned. They differed from tutors, in that a tutor might be appointed without the consent of the pupil, which generally speaking, a curator could not be. A tutor was appointed principally to the care of the person, a curator to the care of the property. A father could not appoint a curator by will; he might declare a testamentary tutor. A tutor could not be sued by the pupil till after tutelage, a curator might be sued by the minor during his curatorship. In these several respects, the office of curator approached nearer to that of our *Guardian*, than a tutor. See Cujacius, observ. L. 17. ch 7. A curator might be appointed compulsorily ad lites, in case of a payment made by a debtor to a minor creditor. Dig. 4. 4. 7. 2. or where a tutor gave in his account. L. 7. Cod. qui petant Tut.

Until the time of Caracalla and Justinian, from the difficulty that minors experienced in getting possession of their property, they were induced to apply to the courts, to have curators appointed, Dig. 4. 4.

1. 3. Dig. 26. 6. 2. 4 and 5. But those emperors relaxed the practice and exonerated persons from compulsory curatorship.

Masculi quidem puberes. By the civil law, males of twenty five years of age, and females of eighteen having given sufficient proof by five or more witnesses of their prudence and morality, might obtain a licence from the emperor enabling them to manage their own affairs, under proper restrictions. For minors are not permitted by this licence to aliene, or even to mortgage their immoveable possessions, without a special decree for this purpose. Cod. 2. 45. 1, 2, 3. De his qui ven. ætat, impetr.

§ 1. *A quibus dentur curatores. Testamento non dantur.* For a father cannot dispose of the goods of his son arrived at puberty, who at that age may make a will for himself, Dig. 28. 6. But the magistrates usually appointed the curator recommended by the father, Dig. 26. 1. 39. 1.

§ 2. *Quibus dentur. Item inviti adolescentes.*] *Rævardus* and others have accused *Tribonian*, as guilty of an error, in saying, that minors, after fourteen, could not be obliged to receive curators.——And, in support of their accusation, they alledge the opinion of *Ulpian*, whose words are these.——*Hodie in hanc usque ætatem adolescentes curatorum auxilio reguntur, nec ante rei suæ administratio eis committi debebit, quamvis bene rem suam gerentibus.* ff. 4. t. 4. l. 1.——But it must be observed, that, with regard to minors after puberty the *Roman* law has frequently been altered. By the law *Lætoria, ann. urb. con.* 550, such adults only, who behaved ill, were obliged to receive curators after proof had been made of their ill behavior. But afterwards it was enacted, by a constitution of *Marcus Antoninus*, *Ut omnes adulti, curatores acciperent, non redditis causis:* which must mean, that adults might be *obliged* to receive curators, although nothing could be alledged against their conduct: for it is certain, that adults might voluntarily receive curators, even before the law *Lætoria*. And, when *Ulpian* wrote, the constitution of *Marcus Antoninus* was as yet unrepealed; but afterwards, in the latter part of the reign of *Antoninus Caracalla*, it appears from *Cod. 5. t. 31. l. 1.* that the *Roman* law was again altered, and that curators could not be given, but to such minors as were willing to receive them, unless *ad litem*.

And in this, the law of *England* may be said to agree in general with the civil law: for, with us, guardianship regularly determines, when the minor has completed his fourteenth year; except, when there is a guardian by nature, or when the father of a minor has specially appointed a guardian either by deed, or will, to continue for a longer

time. And therefore a minor, after fourteen, being of course freed from custody, is at liberty, if willing, to put himself a second time under guardianship, until he is of full age. But, if a minor, being an adult, does not consent to receive a new guardian, then no court would appoint a guardian, unless *ad litem*.

But, if a testator nominates a guardian, till his son arrives at full age, then the son, although above fourteen, is compelled to receive the guardian, who is thus expressly appointed for a certain time; but, if no certain time is mentioned, there is then no guardianship, if the minor is an adult. *Vaugh.* 185. (Harris.)

§ 3. *De furiosis et prodigis.* The text is here deficient and the translation follows the pharaphrase of Theophilus.

In England, whose decisions I believe are generally adopted in this country, lunatics are put into commission under chancery jurisdiction: and lunacy is held to extend not merely to strict insanity, but to all cases of mental imbecility or incapacity from any cause, as disease, habitual intoxication, &c. *Ridgeway v. Darwin*, 8 Vez. 65. *ex parte Cranmer*, 12 *Vez.* 445. How far the court of chancery will interfere in the disposal of a lunatic's estate, what nature and extent is conceded to a commission of lunacy, and to what controul they are subject, will be found under this head in each of the volumes of Vezey, junior, from 8. to 14.

In Holland I believe curators are appointed to take care of the estate of prodigals. See the cases cited in the notes to *Folliot v. Ogden.* 1 Henry Blackstone's Rep. 131.

The chancery jurisdiction in cases of ideocy and lunacy in England, arises from the fiction that the king is the guardian of all such persons. 4 Co. Rep. 125.

Tit. 24. *Qui satisdare cogantur, p.* 55. This was done by joint security; *fide-jussore.* Dig. 46. 6. pass. except in testamentary curatorships, for the same reason that we do not compel an executor, although, we compel an administrator to give security. Guardians appointed by the court, were sometimes exempted. Dig. 26. 2. 17. 19. L. penult Cod. de tut. et cur. qui non satisd. L. 7. § 5. Cod. de curat. fur. Dig. 26. 5. 13 et ult.

§ 2. *Qui ex administratione. Sciendum.* Various remedies are given to pupils and minors, who have received any damage by the male-administration or negligence of their tutors or curators.

The personal actions, to which minors are intitled, against their tutors or curators, are called *Actiones tutelæ* and *negociorum gestorum utiles.*——*Quicquid tutoris dolo vel lata culpa aut levi, seu curatoris, mi-*

nores amiserint, vel, cum possent, non acquisierint; hoc in tutelæ seu negotiorum gestorum utile judicium venire, non est incerti juris.

Cod. 5. t. 51. *l.* 7.

And the heirs of tutors and curators are also liable to the same actions *ob dolum et latam culpam.* Cod. 2. t. 19. *l.* 17.

Pupils or minors may also sue the sureties of their tutors or curators, (and even their heirs) by an action arising from the stipulation entered into by such sureties. *D.* 27. *t.* 7. *ll.* 3, 5. *Cod.* 5. *t.* 57. *ll.* 1, 3.

And lastly, as their dernier resort, minors have a right to an action called *subsidiary*, against any magistrate, who hath neglected to do his duty, either by taking no security, or what was not sufficient. *D.* 27. *t.* 8. *l.* 1. §. 6.

But the heirs of tutors, curators, sureties and magistrates, are only suable in cases of fraud in themselves, or in those, to whom they are heirs; but not merely on account of negligence. *D.* 27. *t.* 7. *l.* 4. *C.* 5. *t.* 75. *l.* 2. *Claude Ferriere, h. t.* (Harris.)

[Constitutionibus] *Cod* 5. *t.* 43. *l.* 3.

Cicero mentions the *judicium tutelæ*, orat. pro Roscio 6. Delinquent tutors were sometimes very severely punished: see Suet. in Galb.

§ 3. *Si tutor vel curator cavere nolit.* L. 3. Cod. de suspect. tut.

§ 4. *Qui dicta actione non tenentur. Exigere solent.* The action of caution was the business of inferior magistrates: of the scribes at Rome, and of the Duumviri in the provinces. Cod. 5. 75. ult. Dig. 27. 8. 1. Dig. 15. 1. 1. (Harris.)

Tit. 25. *De numero Liberorum.* p. 57. *Excusantur autem.* There is no compulsory guardianship either in England, or this country.

§ 1. *De administratione rei fiscalis. In semestribus.* The *semestre concilium* was a privy counsel, composed of a certain number of senators chosen by lot, and changed every six months. This council was first appointed by Augustus Cæsar, that he might diminish the power of the senate and encrease his own. Suet. in Aug. ch. 35. Dion. L. 53. Dig. 27. 1. 41. Cod. 5. 62. 10. 25.

§ 4. *De lite cum pupillo*, &c. p. 58. This law is now useless, for by the 72nd Novel, Justinian prohibited the debtors and creditors of minors from being tutors or curators. (Harris.)

§ 5. *De tribus tutelæ et curæ oneribus.* See Dig. 27. 1. 31.

§ 6. *De paupertate. Divi fratres.* The emperors were stiled *divi*, or divine, because they were considered in every respect as gods, after the ceremony of their apotheosis had been performed. Herod. Lib. 3. The *divi fratres* here spoken of, are conjectured by Vinnius to

have been Marcus Aurelius, and Ælius Verus, the sons of Antoninus Pius.

§ 11. *De Inimicitiis*, &c. p. 60. By a capital enmity, is understood such as might arise from a public accusation, affecting the life, liberty, and good name of the party accused. Dig. 50. 16. 103. But even such an accusation would not excuse a testamentary tutor, inasmuch as the appointment would imply the testator's forgiveness, unless it appeared that he acted upon another motive, and intended only to lay a burden upon the person, whom he had nominated. Heinecc. Vinn.

§ 14. *De Militia.* But if he had voluntarily acted, he would be subject to the action *negotiorum gestorum.* Cod. 5. 33. 4. Cod. 6. 36. 8.

§ 16. *De tempore et modo proponendi*, &c. p. 61. *Non appellant.* That is, they should not appeal from the appointment, but from the decision by which their excuses were rejected. Dig. 49. 4. 1.

Tit. 26. *Unde suspecti:* p. 62. *Crimen* here means an accusation. So it is rendered by Theophilus περὶ τῆς κατηγορίας. So Cicero pro Roscio; "Roscius appears to me to have three obstacles to contend with, *Crimen adversariorum, et audacia, et Potentia.*" (Harris.)

§ 2. *Qui suspecti fieri possunt*, p. 63. *Et possunt quidem omnes.* Guardians at common law may be removed or compelled to give security, if there appears any danger of their abusing either the person or the estate of the minor. *Stiles*, 456. *Hard.* 96. 3 *Chan. rep.* 58. 1 *Sid.* 424.

But there is no instance of the removal of a statute guardian. Yet terms have frequently been imposed, so as effectually to prevent such guardian from doing any act to the prejudice of the minor. But *quære* whether causes may not arise for which a statute or testamentary guardian may be totally removed, notwithstanding the statute; as if he became lunatic, &c. for a guardianship being a personal is not an assignable office; nor can it go to executors or administrators. Vaugh. 180. Cas. in eq. ab. 261. So far *Harris.* That guardianship is not assignable, 9 Mod. 90. *Reynolds v. Lady Tenham. Mellish v. Da Costa*, 2 Atk. 14. It was decided in *Foster v. Denny*, 2 Cas. in Ch. 237. that although a guardian at common law might be removed, a statute guardian could not. But I doubt whether this be law, see the cases of *Roach v. Garvan*, 1 Vez. Sen. 160. *Duke of Beaufort v. Berty*, 1 P. Will. 706. *O'Keefe v. Casey*, 1 Sch. and Lefroy, 106.

Guardians under the English law, were either guardians, 1st, By chivalry: or 2ly, By socage: or 3ly, By nature, as the parent: or

4ly, By nurture, which is nearly the same: or 5ly, By statute, (to wit, by 4 and 5 Ph. and Mary Ch. 8 and 12 Ch. 2 ch. 24. which enables a father to appoint a testamentary guardian: or 6ly, By custom. Co. Litt. 88. b. To which may be added after Hargreave in his notes thereon, 7ly, By election of the infant; before a judge on the circuit, or by deed, as in the case of lord Baltimore for the custody of his Maryland estate: or 8ly, By appointment of the chancellor: or 9ly, By the ecclesiastical court: or 10ly, Ad litem.

In Pennsylvania, we have no chivalry: nor as I incline to think any tenure in the socage since the revolution, notwithstanding the terms of Penn's charter. Our tenure, being free of any rent or service, but what the state (i. e. the great mass of citizens) imposes by common consent, seems to be, allodial. We acknowledge guardianship of parents, and guardians appointed by will of the parents, and guardianship by appointment of the orphans court, without the consent of the minors if under 14 by petition of the mother or prochein ami, and with the consent of the minors if above 14, signified in open court. Our laws also, compel guardians and executors of whatever description to give security, if good cause be shown; and for like cause I apprehend they are also compellable to give additional security, or may be removed: see the laws of this state relating to the power and duties of the orphan's court.

Curators are appointed to minors by the code Napoleon; which also adopts the provision of the civil law for curators *ad custodiam ventris*, in favour of the heir.

Fama patroni parcendum. The action was directed to be an action on the case, *in factum*, in which no suggestion of fraud was permitted. Dig. 4. 3. 11.

§ 5. *Qui dicatur suspectus*, p. 64. Cod. 5. 43. 23.

§ 12. *Si suspectus satis offerat, et quis dicatur suspectus*, p. 64. The provisions of the latter part of this section are supported by *Rex v. Sir Richard Haines*, 1 Lord Ray. 361. and 12 Mod. 205. and *Hill v. Mills*, 1 Show. 293. and 12 Mod. 9. *Anonymous*, 12 Vez. 4. Generally although the court of chancery on evidence of misapplication of assets, or danger of the estate will appoint a receiver over an executor, it must be a strong case, *Middleton v. Dodswell*, 13 Vez. 266.

Liber 2. *Tit.* 2. *De fluminibus et portubus*, p. 68. see Hargreave's law tracts de portibus maris; and the cases of *Cortelyon v. Van Brundt*, 2 Johns. N. Y. Rep. 360. and a full discussion of the right of fishery in Pennsylvania, in *Carson v. Blazer*, 2 Binney 475.

§ 4. *De usu et proprietate riparum.* See farther on this subject Dig. 43. 12. 3. and 41. 1. 15. 30.

The law of Pennsylvania on this subject will be found in part in the case of *Carson v. Blazer*, above cited from 2 Binn. 475. As to the law of England consult the 6th chapter of Sir Mathew Hale's treatise, *de portibus maris*, published by Hargreave among his law tracts: the case of *Young v.* ———, 1 Ld Raymond, 726, which determines that at common law, the public are entitled to towing paths along the banks of navigable rivers; also again determined by Holt, in *Domina regina v. the Inhabitants of Chiworth*, 6 Mod. 163. overruled in *Ball v. Herbert*, 3 Term Rep. 253, where the question is discussed at length. The case of the London wharves, 1 Sir W. Black. 583, determined that commissioners appointed by the king to lay out wharves, could only lay them out in places unbuilt on and open. As to the right of taking fish on the sea shore between high water mark and low water mark, see *Bagott v. Orr*, 2 Bos. and Pull. 472.

§ 10. *De rebus sanctis.* p. 70. *Res sanctæ*, that is, *res sancitæ: sanctione aliqua munitæ:* protected specially. I have translated it holy, as Harris has done; but the meaning may be different from Res sacræ, and Res religiosæ, which were set apart for religious purposes, and were divini juris: so in the same sense, the persons of princes and embassadors were sanctæ. Liv. III. 55. Magistrates, &c. Dig. 1. 8. 8. 1. But *res sanctæ* also include the *res sacræ and religiosæ.* Gaius in Dig. 1. 8. 1. pr. *Sanctum esse interdum idem quod sacrum, idemque quod religiosum: interdum aliud, hoc est nec sacrum nec religiosum. Macrob. L. c.*

§ II. *De reb. singulorum.* p. 70. Dominium is divided into three kinds by the civilians. It is either, 1st *directum dominium*, or usufructuary dominion. *Dominium utile*, as between landlord and tenant. Or it is 2ly full property and simple property. The former is such as belongs to the cultivator of his own estate, the other is the property of a tenant. 3ly Dominion acquired by the law of nations, and dominion acquired by municipal law. By the law of nations property may be acquired by occupation, by accession, by commixtion, by use or the pernancy of the usufruct, and by tradition or delivery.

As to the *dominium eminens*, the right of the public in cases of emergency to seize upon the property of individuals, and convert it to public use; and the right of individuals in similar cases to commit trespass on the persons and properties of others, see the opinion of chief justice M'Kean, in *Respublica v. Sparhawk*, 1 Dallas, 362, and the case of *Vanhorne v. Dorrance*, 2 Dall. Rep. 304. I am not convinced by Judge Patterson in that case, that a just compensation must always be a money price.

See farther as to *dominium eminens*, or the right of the community to take at a fair price the property of individuals for public use, the supplement of 1802 to the Pennsylvania compromising law respecting the Wyoming controversy. Vattel L. I. ch. 20. § 244—248. Bynkershoek, Lib. 2. ch. 15. Rousseau's social compact, ch. 9. Domat, L. 1. tit. 8. § 1 p. 381. fol. ed. De Tott's mem. the case of a Jew, whom the Grand Signor was compelled by the Mufti to purchase out: cited in *Lindsay et al. v. the Commissioners*, 2. Bay. South Carolina rep. 41. § 13. *De vulneratione. In Sutton and Moody*, 1 Salk. 556. 1 Lord Ray, 250. Comyns, rep. 34. cited in *Vere v. lord Cawdon*, 11 East. 570, if one start a hare in my close and kill her there, it is my hare: otherwise if he hunt her into the ground of another; for then it is the hunter's. Though this indeed is not exactly the case of the text.

In *Pierson v. Post*, 3 Caines N. Y. rep. 175. the question is very fully discussed, with references to the civil law doctrine, and the law as laid down by Puffendorf and Barbeyrac, and Fleta, and Blackstone; and determined that *wild animals*, feræ naturæ (this was the case of a fox) become the subjects of occupancy, only when they are either taken, or so disabled or circumvented as to render their capture certain: and therefore, that no action will lie against B for killing such an animal, originally started and pursued by the Plaintiff A who was on the point of taking it. That a fox is always so considered is certain, see the opinion of the court, in *Respublica v. Sparhawk*, late above quoted.

I confess I do not consider the subject exactly in the same point of view. It appears to me that the question is not merely whether the animal pursued be feræ naturæ or not, but whether it be wild and noxious, without being valuable. A fox, a bear, a stag, a beaver, a racoon, an otter, &c. are clearly wild animals; but the skin of them may be of more value than the flesh of a tame animal of equal size. If I pursue the creature for profit, I am entitled to it, if I have so conducted the chase as to put the animal in my power: any other person coming in between me and manucaption in such a case, cannot be considered as entitled to any part of the prey. Just as if a ship of war of a belligerent, pursues an enemy's vessel, and so gains upon her, being of superior force also, that the capture is certain, in such a case, another vessel of the same belligerent assisting, would not be entitled to any share of the prize money: but if the latter vessel, rendered a doubtful chance certain, and contributed to take a prize which probably would not have been taken without such assistance, then the prize cannot be claimed in toto by the first pursuer.

But if the wild animal be pursued not for profit but extirpation,

then, any intervenient person, may as I suppose, lawfully assist; and no action lies against him for killing it, though started and chased by another: as was determined in Pierson v. Post. Still, a distinction may reasonably suggest itself, when the animal is pursued not for the mere purpose of extirpation, but for the pleasure of hunting, according to the usual rules and practice of those who follow that amusement. I well remember that in my time and in my immediate neighbourhood in Cheshire in England, foxes were regularly imported from France to supply the demands of the HUNT. The sudden shooting of a fox just ran down after a day's chase, would in that part of the kingdom be regarded as an outrage upon the rights of the pursuers, and upon the rules of good manners, not tamely to be borne. But the law has hitherto it seems, refused to recognize the rights of Foxhunters.

§ 14 *De Apibus*, p. 72. In conformity to the doctrine here laid down, it is decided in *Gillet v. Mason*, 7 Johns. N. York Rep. 16, that Bees are *feræ naturæ*, and until hived and reclaimed, no property can be acquired in them: and that the finding a Bee-tree on the land of another, and marking it with the initials of the finder's name, is not such an appropriation as will be a substitute for the actual reclaiming of them: nor can the finder maintain trespass against any other person who under these circumstances cuts down the tree, and takes the honey.

In Wallis v. Mease, 3 Binney, 546, It was determined that wild bees remaining on the tree where they have hived, not withstanding the tree is upon the land of an individual, and he has confined them in it, are not the subjects of felony. This section of Justinian is there cited and assented to by Judge Brackenridge, who enters at some length into the reason of the doctrine: see 2 Blacks. Comm. 392. Bro. Abs. title Property, 37.

§ 18. *De occupatione eorum*, p. 73. Found—means, not merely discovered, but taken up. Dig. 41. 2. 1. 1.

§ 19. *De fœtu animalium*, p. 73. That is by accession: which is 1st by increment of stock. 2ly By alluvion. 3ly An article manufactured out of materials belonging to us. 4ly By the annexation or junction to our property, of something belonging to another.

§ 20. *De alluvione*, p 74. This doctrine of alluvion is the law of England also: See 2 Black. Comm. 261. *Adams v. Frothingham* 3 Massach. Rep. 352.

§ 21. *De vi fluminis*, p. 74. Dig. 41. 1. 7. 1. Dig. 39. 2. 9. 2. But if I leave it till it can no more be separated, I have a right to nothing

but an action for the value. Dig. 6. 1. 23. 3. and 6. 1. 5. 3. Dig. 41. 1. 9. Lord Ray. 737 *Waterman v. Soper.*

§ 22. *De insula*, p. 74. The law of England is different, by which it belongs to the king. 2 Black. Comm. 261. Some of the principles on this subject are touched in *Carson v. Blazer.* 2 Binn. 485.

§ 23 *De alveo*, p. 75. Dig. 43. 12. 1. 7. Dig. 7. 4. 24. Dig. 41. 1. 7. 5.

§ 25, *De specificatione* p. 75. Sabinianorum et Proculianorum.] The two sects of *Sabinians* and *Proculians* took their rise in the reign of *Augustus*, but were not distinguished by any particular appellation, till long afterwards: for the *Sabinians* obtained their name from *Sabinus*, who was a favourite of the emperor *Tiberius;* and the *Proculians* were so called from *Proculus*, who flourished under *Vespsian.* It is generally held, that *Atteius Capito*, who lived in the *Augustan* age, and was a person remarkable for his great attachment to precedents and old customs, was the chief of the *Sabinians;* and that *Antistius Labeo*, his cotemporary, who did not confine himself wholly to rules, but followed principally the dictates of reason and his own understanding, was the head of the *Proculian* sect. These sects continued in vogue to the reign of *Marcus Aurelius*, till which time, the students of the law generally attached themselves to either the one or the other. But the lawyers of that reign affected neither party in particular; for at different times they dispassionately approved the opinions of either sect, as they judged them more or less agreeable to justice and right reason: and they generally endeavoured by an equal temperature, to avoid the absurdities, into which both parties, by reason of their great dislike and opposition to each other, had frequently fallen. *ff.* 1. *de origine juris. Hist. du droit Romain, par* Claude Ferriere.

These lawyers (who from their conduct were denominated *Erciscundi*, from the old verb *erciscere* to divide) are the persons, hinted at by *Justinian* in this paragraph; as observing a just mean between the two parties. (Harris.)

This is somewhat like the old question of the schools, *an forma, dat esse rei:* which *Proculus* determined in the affirmative. Dig. 41. 1. 7. 7. See on this subject *Tanson v. Collins*, 1 sir W. Bl. 307 and the references to Puffend. and Selden's Mare claus.

§ 26. *De accessione*, p. 77. Dig. 6. 1. 23. 5 and 6. 1. 26. 1 Dig. 34. 2. 19. 13.

The *Condictio* lies against the heirs of the purloiner; Dig. 13. 1. 5. Against other possessors, the action *ad exhibendum* lies, to ascertain whether the two materials can be separated. Dig. 10. 4. 6 and 7.

Dig. 6. 1. 23. If it cannot, then the action *triticaria* lies : Dig. 13. 3. 1 or the action on the case *(in factum)* Dig. 6. 1. 5.

§ 27 *De confusione*, p. 77. Electrum, seems to be Amber in 4 Plin. 16 and 37. Plin. 2. But in 33. Plin 9. it is a metal, as it is here. Platina? See Thompson's Chemistry, Platina.

§ 29. *De his qui solo cedunt*, p. 78. Dig. 41. 1. 7. 10. Dig. 6. 1. 7. 11 and 6. 1. 23. ult. Dig. 41. 2. 30. Dig. 41. 3. 24. As to the action de *Tigno juncto*, see Dig. 41. 1. 7. 10. Dig. 6. 1. 23. 6. Dig. 47. 3. 1. and 47. 3. 2.

§ 30. *De ædificatione ex sua materia*, p. 78. Dig. 41. 7. 12. Dig. 6. 1. 7. et seq. L. 2 and 5. Cod. eod. Dig. 6. 1. 38. Dig. 50. 17. 203.

§ 31. *De Plantatione*, p. 79. But the owner of the tree may recover its value. Dig. 6. 1. 5. 3. and 6. 1. 23. 5.

Confinium. The Romans required five feet to be left between farm and farm as a boundary : or rather, between the trees of your neighbour and your own ; except in the case of an olive or a fig, when they required a space of nine feet between : agreeable to a law of Solon, quoted Dig. 10. 1. 13.

§ 32. *De sationc*, *p.* 80. Dig. 6. 1. 23. 3. Dig. 41. 3. 25. Dig. 41. 1. 9.

§ 33. *De scriptura*, p. 80. I apprehend this would not now be considered as law, the value of the paper being so much more easily paid than the writing ; conformably to the principle of the next section *de pictura*. Herein agreeing with the argument of Sir. W. Blackstone against Thurlow in the great case of literary property ; *Tonson v. Collins*, 1. Sr. W. Bl. 324. 307.

§ 35. *De fructibus bona fide perceptis*, p. 82. Dig. 41. 3. 45. Dig. 41. 1. 4. Dig. 41. 3. 4. 19.

§ 37. *Quæ sunt in fructu*, p. 83. Dig. 22. 1. 38. 5. Dig. 41. 3. 28. 1. Dig. 7. 1. 68.

But although the child may not strictly be called *fructus*, which is applied rather to natural productions by way of accession, and a female slave cannot be said naturally to be destined to produce bond children Dig. 21. 1. 44, such offspring is nevertheless a species of revenue, Dig. 41. 3. 8, and 14. Dig. 35. 2. 24. 1. Dig. 30. 1. 91. 7.

§ 38. *De officio fructuarii*, p. 83. A flock is a noun aggregate, and therefore must be restored as a flock by the usufructuary ; but if each sheep of the flock had been specifically bequeathed in usufruct, the usufructuary would not be bound to replace those who died. Dig. 7. 1. 70. 3. See some observations on usufructuary rights in *Putnam v. Wylie*, 8 Johns. N. Y. Rep. 433.

§ *De inventione Thesauri*, p. 83. By a treasure is meant something of which the owner is absolutely unknown, else *Revendication* would attach. Dig. 6. 1. 6. Dig. 10. 4. 15. Treasure trove, under some of the Emperors, belonged entirely to the treasury, Lib. 15. Tacit. Annal. L. 1. Cod. Theodos. de Thesaur. Adrian (according to his life by Spartian) gave the treasure exclusively to the finder, if found on his own grounds, or in any religious or sacred place. But if found on another man's ground, it was divided between the finder and the owner of the ground.

Marcus Antoninus and Verus, directed, that if found in a fiscal, religious, or sacred place, one half should go to the treasury. Dig. 49. 14. 3 penult. Leo, decided according to the opinion of Hadrian (Adrian) L. un. Cod. Thesaur, and so did Justinian in the present section.

As to mines. Formerly the owner of the land had the exclusive right. Dig. 7. 1. 13. 5. latterly the emperor exacted a toll. L. 1 and 2. Cod. de metall.

Thesauros] Treasures naturally belong to the finder; that is, to him, who moves them from the place where they are, and secures them; yet nothing forbids but that the laws and customs of any country may ordain otherwise. *Plato* was desirous, that notice should be given to the magistrates, and that the oracle should be consulted: and *Apollonius*, looking upon a treasure found as a particular blessing from heaven, adjudged it to the *best man*. The *Hebrews* gave it to the owner of the ground where it was found, as may be gathered from *Christ's* parable, *Matt.* xiii. 44. and, that the *Syrians* did the same, we may infer from a story in *Philostratus*, lib. vi. cap. 16. The laws of the *Roman* emperors are very various upon this subject, as appears partly from their constitutions, and partly from the histories of *Lampridius*, *Zonarus* and *Cedrenus*. The *Germans* awarded treasures found, and indeed all other ἀδέσποτα (*i. e.* things without an owner) to their prince; which is now grown so common, that it may pass for the law of nations; for it is now observed in *Germany*, *France*, *Spain*, *Denmark*, and *England*; where treasure-trove is understood to be any gold or silver, in coin, plate or bullion, which hath been of ancient time hidden; and wheresoever it is found, if no person can prove it to be his property, it belongs to the king, or his grantee. A concealment of treasure-trove is now only punished by fine and imprisonment; but it appears from *Glanville* and *Bracton*, that *occultatio thesauri inventi fraudulosa* was formerly an offence punishable with death. 3. *Co. inst.* 132, 133. *Custum. de Norm. cap.* 18. *Grot. de jur. bell. et pac. l.* 2. *cap.* 8. *sect.* 7. Harris.

§ 40. *De traditione*, p. 84. *Stipendiaria;* paid tribute to the people; *Tributaria*, to the prince.

Tradition or delivery, is either real, as of a piece of goods to the purchaser, or symbolical, as the keys of a house; or with us, a ship's papers. Dig. 18. 1. 74.

§ 41. *Limitatio*, p. 84. *Ex promissor*, bondsman: one who makes himself originally liable for the debtor. *Ad promissor*, a guarantee, or surety.

By the civil law, goods sold and delivered might be reclaimed if not duly paid for. Dig. 18. 1. 19 and 53. Dig. 14. 4. 5 penult. Dig. 19. 1. 11. 2.

Thursby's assignees v. Gray's administrators. Debt on bond. Com. Pleas, Northumberland county, 1808. *Spring*, a storekeeper, purchased goods at public auction belonging to *Thursby*, and gave bond for the payment of the amount in six months; in which bond, *Gray* joined as surety. The bond was not demanded at the expiration of the six months either from *Spring* or from *Gray*: it lay thus till *Spring* became insolvent about two years from the date of the bond. It did not appear that payment had ever been demanded, either from *Spring* or *Gray*. *Spring's* insolvency began to be suspected about a twelvemonth before he actually failed. Previous to that time, and for a twelvemonth or more from the date of the bond, it might have been received on demand, or recovered at law, without doubt. *Spring* lived in Northumberland town, and *Gray* in Sunbury, about two miles off. Sometime after *Spring's* failure the assignees of *Thursby* brought suit on the bond against the administrators of *Gray*. I charged the jury that the administrators of *Gray* under these circumstances, were not liable. The jury brought in a verdict accordingly.

This case came on to be argued in the supreme court of Pennsylvania, sitting at Sunbury in June, on the ground of misdirection of the judge in point of law, and it was held that the doctrine laid down by judge Cooper was not supported to this extent, by any case in the English books, and the verdict was set aside. This case is not reported in Binney; I am therefore unable to state the precise grounds of decision of the supreme court. But as a view of the leading cases of suretyship may be of use to a student, I have collected them. "Surety relieved in equity where a bond was continued in use without "his privity, he thinking the same to be paid. *Bullock and Pope*, 11 "Car. 1. Tothill's reports in chancery, p. 180."

The same point (equally broad) in *Saunders v. Churchill and Smith*. Ib. 181.

The same point in *Moile v. Roberts*, Ib. 182.

The same point in *Hare v. Mitchell*, Ib. 81.

The same point Carey's Chancery Reports p. 1 and 2.

The leading principle of the following cases, is, that "the contract "of a surety shall be construed according to the letter, strictly and in "his favour: and shall not be extended by implication." A doctrine indeed, laid down as the result of all the cases of suretyship, nearly in the same words by Lord Mansfield in *Dance et al. v. Girdler*, 4 Bos. and Pull. 34. and by Buller *in Stratton v. Rastall*, 2 Term Rep. 370. and by Spencer and Thompson Justices, in *Ludlow v. Simond* in error. 2 New-York, cases in error, 29. 57.

Lord Arlington v. Merrick, 2 Saund. 411.

Horton v. Day. Ib. in notis.

Wright v. Russel, 3 Wils. 530. 2 Black. Rep. 934.

Skip v. Hay, 3. Atk. 91.

Barker v. Parker, 1 Term Rep. 287.

Barclay v. Lewis, Ib. in not.

Stratton v Ralston, 2 Term Rep. 366.

1 Barns, 214.

Nesbitt v. Smith et al. 2 Prr. Ch. Cas. 579.

Rees v. Barrington, 2 Vez. junr. 540.

Law v. East India Comp, 4 Vez. 824.

Dance v. Girdler, 4 Bos. and Pull. 34.

Leverpool Comp. v. Atkinson, 6 East, 509.

To these may be added the analogy of all the cases, relating to the holding over a negotiable security as a bill of exchange. See also *the people v. Jansen et al.* 7 Johns. 332.

The above case however, of *Thursby's Assignees v. Gray's administrators*, seems to settle the law in Pennsylvania, that no surety in a bond can discharge himself, but by payment of principal and interest.

This 41st Section is discussed in *Ludlow v. Bowne and Eddy*. 1 Johns. N. Y. rep. p. 17. which in part is a case of stoppage in transitu; a branch of law connected with, and as it seems to me arising out of the doctrine laid down in the first sentence of this section, though somewhat modified. The general principle involved in the right of stoppage in transitu, is, that goods being ordered by a customer, and packed up and sent off to be delivered according to that order by the merchant may be stopt in their way or passage to the place of delivery if the merchant has reason to suspect the solvency of the consignee, or purchaser.

The first case reported in the books on this subject wherein the right of stoppage in transitu was allowed, is *Wiseman v. Vandeputt*, 2 Vern. 203. which was confirmed obiter in *Snee and Baxter v. Prescott et al.* 1 Atkins, 249. and in *Birkitt v. Jenkins* cited in *Vale v. Bayle*, Cowp. 296.

The cases are very numerous on this head, and it would immoderately extend this note, to abridge them all; but the leading principles already settled, are, that as between vendor or consignor, and vendee or consignee, the property of goods ordered and sent, is not altered till actual delivery; and the vendor has a right to stop them in transitu: but 1st, This is a right that exists only between the consignor and the consignee; and cannot be defeated, by the contracts, or proceedings of third persons, excepting those who claim by bonâ fide purchase and sale under the consignee. 2ndly. It can be exercised only during the transit: thus goods may be stopped in the hands of a carrier: but if delivered into the possession of the agent: or of the accustomed wharfinger of the consignee: or if to any wharfinger, who makes an entry of them in the name of the consignee, and charges him with wharfage: or if the consignor charges ware-house-room after they are packed up: or if the assignee of the consignee puts his mark upon them and exercises ownership over them: or if they are directed to be sent and are sent to any particular place, though short of the place of abode of the consignee, who then exercises the right of ordering them to an ulterior destination: (but compare *Stokes v. Riviere*, cited 3 Term Rep. 466, & 1 Campb. 282, with 5 East, 175,) or though there be only a part delivery to, or an actual occupancy of a part only by the consignee his agent or his assignee, it stands for a delivery and occupancy of the whole, and destroys the right of stoppage in the transitu. But part payment does not take away this right; nor is the vendor affected by any agreement between the consignee and the carrier, or by any lien of the latter, but the vendor may pay the carriage and retake the goods; and hold them on his own account, or may again tender them to the vendee and bring suit thereupon for the amount, if no loss or damage hath arisen from the detention. 3dly, The assignment of a bill of lading divests the vendor of this right, as it was held at first to do in *Lickbarrow v. Mason*, 2 Term Rep. 63, overruled in error in the exchequer chamber, 1 Hen. Blacks. 357: and finally settled as at first decided, 6 Term Rep. 20. *Newson v. Thornton:* for the bill of lading is now considered in the light of a negotiable instrument. So, where the vendor gives an order to the vendee, who thereupon procures an entry of them to be made in his name as

owner; or becomes liable for ware-house-room or wharfage; or on the strength of that order, sells them to a third person bona fide; or where they by any means come into possession of a bona fide purchaser under an act of ownership of the first vendee, in all these cases, the vendor's right of stoppage in transitu is divested.

4thly. As to suits of trover against carriers, or assumpsit by them. Carriers are liable to trover by the vendor; for goods while in their possession are in transit: when once delivered according to order, the carriers are discharged. As to their right of action for the carriage. It seems that unless the general rule be modified by some special agreement, the consignee is liable for freight and carriage: they are delivered to the carrier as being the goods of the consignee to be delivered to him. Hence the consignee may sue the carrier for loss or damage, for on delivery to the carrier, the property vests in the consignee, subject only to the right of the consignor to stop them in transitu. 3 Bos. and Pull. 48. 119. and *Dutton v. Solomonson*, ib. 582. *Coxe v. Harden*, 4 East, 211. 1 Johns. N. Y. Rep. *Ludlow v. Bowne and Eddy*.

5thly. The bankruptcy of the vendee, does not of itself operate as a countermand of the order, or avoid the sale.

The French law as laid by Pothier in his Traité du Contrat de Vente. n 332, is conformable to this section of the Institutes: viz. that even though the goods be delivered to the purchaser, the property is not out of the owner till they are paid for, unless under a special contract of selling them on credit.

The following list of cases on the subject of stoppage in Transitu, may be of use, as I do not know where else they are collected.

Wiseman v Vandeput, 2 Vern. 203. A. D. 1690.
Snee and Baxter v. Prescott et al. 1 Atk. 246. A. D. 1743.
Fearon v. Bowers, cited 1 Hen. Blacks. 364: A. D. 1753.
Burghall v. Howard, cited in the same case. 32 Geo. 2.
Birkit v. Jenkins in *Vale v. Bale*. Cowp. 296.

Lickbarrow v. Mason,
- 2 Term Rep. (Durn. and East,) 63.
- 1 Hen. Blacks. 357.
- 2 Hen. Blacks. 211.
- 5 Term Rep. 683.
- 6 Term Rep. 20.

Solomons v. Nissin, 2 Term Rep. 674.
Kinlock v. Craig, 3 Term Rep. 119.
Ellis v. Hunt, 3 Term Rep. 464.
Newson v. Thornton, 6 Term Rep. 20.
Owenson v. Morse, 7 Term Rep. 65.
Hodgson v. Loy, 7 Term Rep. 441.
Daws v. Peck, 8 Term Rep. 330.

Sweet v. Pym, 1 East, Rep. 4.
Inglis v. Usherwood, Ib. 515.
Feize v. Wray, 3 East, 93.
Walley v. Montgomery, 3 East, 583.
Dixon v. Baldwin, 5 East, 175.
Newson v. Thornton, 6 East, 20.
Cuming v. Brown, 9 East, 506.

Slubey et al. v. Heyward et al. 2 Hen. Blacks. 504.

Mills v. Ball, 2 Bosanq. and Pull. 457. *Openheim v. Russel*, 3 Bos. and Pull. 42. *Richardson v. Goss*, 3 Bos. and Pull. 119. *Scot v. Petit*, 3 Bos. and Pull. 469. *Hammon v. Anderson*, 4 Bos. and Pull. (New rep.) 69.

Northie v. Cragg, 2 Esp. rep. 613. *Wright v. Lawes*, 4 Esp. rep. 85.

Kymer v. Sowercropp, 1 Campb rep. at Nis. Prius, 109. *Smith v. Goss*, 1 Campb. 282. *Harvy v. Mangles*, 1 Campb. 452. *Harman v. Anderson*, 2 Campb. 243.

I have met with but the following two cases, among the American Reporters. *Hollingsworth v. Napier*, 3 Caines N. Y. rep. 182. *Ludlow v. Bowne and Eddy*, 1 Johns. N. Y. rep. 1 in error.

§ 43 *De quasi traditione*, p. 85. *Acquiritur proprietas.* This is called *fictio brevis manus:* which takes place when goods are put into the possession of some person by way of deposit or loan, and are afterwards given or sold to the same person, he being already the possessor. Dig. 23. 3. 43. Harris.

§ 44. *De traditione clavium*, p. 85. The spirit of this section would embrace our law as to the delivery of possession by the delivery of documents and muniments of title.

§ 46. *De habitis pro derelicto*, p. 85. The English law of waifes, I presume does not extend to this country: in that country waifes, *bona waiviata* belong to the prince by prerogative, 1 Blacks. Comm. 297.

§ 47. *De jactis in Mare levandæ navis causa. Item.* &c. p. 86. As to things *Jetsam, Flotsam and Ligan*, see 1 Black. Comm. 293.

Furtum committit.] None of those goods, which are called *Jetsam*, (from being cast into the sea while the ship is in danger) or those called *Flotsam* (from floating after shipwreck) or those called *Ligan*, (that is, goods sunk in the sea, but tied to a buoy, that they may be found) are to be esteemed wreck, so long as they remain in the sea. And by 3 *Edw.* 1 *cap.* 4. it is enacted—*That if a man, cat, or dog, escape alive out of the ship, whereby the owner of the goods may be known, neither the vessel, nor any thing therein, shall be adjudged wreck; but shall be restored to the owner, if he claims within a year*

and a day. A man, cat, or dog, are only put for examples; but all other living things are to be understood; and, if the owner of the ship should die within the year and a day, his executors or administrators may make proof. 2. *Co. inst.* 167, 168. *Wood's inst.* 214. If the goods are taken away by wrong-doers, the owner may have his action: and, if the wrong-doers are unknown, he may have a commission of oyer and terminer, to inquire what persons committed the trespass, and make restitution. Harris.

Tit. 2. *De servitutibus*, p. 87. *Servitus est jus quo res alterius, rei vel personæ servit*, Dig. 8. 1. 1. *Nemini res sua servit*, Dig. 8. 2. 26. Dig. 7. 6. 5. *Servitus*, a service, is a right by which one thing is subjected to the use or convenience of another thing or person, contrary to common right; and not where one person is subject to another person; which is servitude, though sometime called servitus: as, *servitus uterina*, Taylor 426. 411. 407. Inst. 1. 3. 2. Dig. 1. 5. 4. 1. In translating this word by the word *services* I follow Wood's civil law, Taylor's Elem. civ. law. and Harris. I am aware that lord Mansfield in *Waring v. Griffith et al.* 1 Burr. 443, translates it SERVITUDE. But, he was more intent upon the substance, than the expression, and I prefer Taylor's authority as a critic, to Lord Mansfield's. Cambaceres has *Servitudes ou Services.* Code civil Nap. Art. N°. 526.

§ 1. *De servitutibus urbanis*, p. 88. In the Roman law, all houses and buildings whether in town or country are called *Prædia Urbana:* and all lands, whether meadow, arable, or vineyard, are called *Prædia Rustica:* Dig. 50. 16. 198.

Prædia urbana, city services; are affirmative or negative.

Affirmative: as that I may rest my beam on my neighbour's wall: that my house shall in part rest on his wall: that my house may project so as to throw the path upon his premises: that my eaves may overhang upon his side: that my sink or gutter may pass through his ground: that I may put out lights that overlook him: that my prospect shall be uninterrupted by his buildings, &c. all of which are noticed in the eighth book of the Digests.

Negative services are, that his eaves shall not drop upon my ground: that he shall not build so as to darken my lights, or hinder my prospect: that he shall not put out a window to overlook me: that he shall not raise his house without my permission.

Prædia rustica: rural services; are a right of passing over the grounds of another, by foot path, horse path, or carriage way: Iter, Actus, Via or Aditus. Aqueducts, a right of water course; a right

of drawing water, watering cattle, hunting, fishing, making lime, digging gravel, &c.

Others are personal services, such as the rent services of the feudal times.

The word service in the English law, answers perhaps more properly to *Easement*, than any other synonime, and indeed is used synonimously. Jacob's Law Dict. voce Easement. But on reflection I have preferred, service. As to the law on this subject see *Reynolds v. Clarke*, 2 Lord Raym. 1899. Str. 634. *Peppin v. Shakespear*, 6 Durn. and East, 748. *Allen v. Ormond*, 8 East, 4. The pleading is required to be strict.

I collect the following observations from the notes of Ferriere in Loco.

Services, are incorporeal rights incident to rural or city estates. They do not lie in livery. Dig. 41. 1. 43. 1. Dig. 8. 2. 32. 1. Dig. 8. 1. 14. 17. They cannot therefore be acquired by usucapion, which applies to things in possession only. But they can be prescribed for, and 10 years gives a title between parties present, and 20 years against absentees. But the original title must be *bona fide, nec vi, nec clam, nec precario*, otherwise the prescription must go beyond 100 years according to Cujacius ad Leg. 14 *ff.* de servitut. These services might depend on stipulation and contract. A right of way could not be for a way of less than eight feet when straight, and sixteen when crooked. Dig. 8. 3. 8.

Tit. 4. § 1. *Quibus modis constituitur*, p. 90. In England there are no usufructs under that name. Estates at will and for years however are of the same nature, and usufructs might doubtless be created by compact. The USE of the old English law previous to the statute for transferring uses into possession, 27 Hen. 8 ch. 10. were, as Blackstone observes, 2 Comm. 327, more analagous to the *fidei-commissum* or testamentary trust-estate of the Romans, than to the usufruct of an estate.

§ 2. *Quibus in rebus constituitur*, p. 91. *Senatus censuit.* Dig. 7. 5. 1. 2.

Quasi-usufruct may be of certain cloaths, as *vestes seniles et funerales*, or what our New England people would call a go-to-meeting coat: which is used so sparingly that it is long before it is destroyed by use.

§ 3. *Quibus modis finitur*, p. 91. *Statuit constitutio*, viz. Cod. 3. 33. 16.

It may cease by non-user for one year in respect of things moveable,

and two as to things immoveable. Dig. 8. 1. 4. but by an ordinance of Justinian, three years as to things moveable.

Qua res consolidatio appellatur. This is similar to *merger.*

Tit. 5. § 1. *Quid intersit inter usufructum*, &c. p. 93. Use differs from usufruct. 1st. The latter may be divided, the former is indivisible, L. 5. *ff.* de usufruct. L. 19. *ff.* h. 1. 2ndly. The usufruct extends to all the fruit or produce of the object, the use only to the immediate want of the user. L. 12. §. 1. et seq. *ff.* h. 1. 3rdly. The usufructuary can lend, sell, &c. which is not an incident of use. 4thly, The usufructuary is bound to repairs and replacements, which the heir is not. Ferriere in loc.

Minus autem.] An *Use*, by the laws of *England*, is of as great an extent, as an *usufruct* by the *Roman* law. And by 27 *H.* 8. *He, who hath the use of land, is deemed to have the land itself.* But as to such uses and rights of habitation, which were among the *Romans*, though our laws have not treated of them in any particular manner, yet they may certainly be granted and acquired by special covenants and agreements, as was said of usufruct. *Usus apud nos æque late extenditur, atque ususfructus apud authores juris civilis; sed non video, cur idem jus tam de usu, ut illi eum intelligunt, quam de habitatione, apud nos non teneat, quod olim inter* Romanos *tenebat.* Cowel, h. t. Wood's imp. Law. 151. Harris.

Nudum habet usum.] An usufruct is a right of enjoying all the fruits and revenues, which the estate, subject to it, is capable of producing; but an use consists only in a right to take out of the fruits of the ground what is necessary for the person, who has the use, or what is settled by his title; and the surplus belongs to the proprietor of the estate: thus those, who have the right of use in a forest or copice, can only take what is necessary for their use, or is regulated by their title. And he, who has the use of any other ground, can only take out of it what shall be necessary to supply the occasions he shall have for those kinds of fruits, which the ground produces: or the use may even be restrained to certain kinds of fruits, or revenues, without extending it to others. Thus we see in the *Roman* law, that he, who had only the simple use of a piece of ground, had no share of the corn or oil, which grew in it; and that he, who had the use of a flock of sheep, was restrained only to make use of them for dunging his grounds, and had no share either in the wool or lambs: and even of the milk, it is said in some places, that the usuary could take but a very small portion; and in others, that he had no right to any of it. *ff.* 7. *t.* 8. *l.* 12. *Domat. lib.* 1. *t.* 2. *sect.* 2. Harris.

§ 2. *Ædium usus*, p. 93. No doubt the right to assign the usufruct of a house, might be the subject of special contract under the Roman law.

In what cases a clause in a lease, prohibiting assignment or underletting, shall rank under usual and proper covenants, see *Vere v. Loveden*, 82 Vez. 179, and the cases there cited; also *Jones v. Jones*, Ib. 186. and *Weatherall v. Gearing*, Ib. 511. *Watson v. The master of Hemsworth Hospital*, 14 Vez. 333. But a prohibition of assigning without licence, ceases on licence once granted. *Brummel v. Macpherson*, Ib. 173, and *Jones v. Jones*, 12 Vez. 191.

Such a prohibiting clause however, becomes void on the bankruptcy of the lessee. *Weatherall v. Gearing*, 504. Agreement to let, not held a lease if any thing executory remained. 12 Vez. 413

Nostra decisione.] Whoever hath a right of habitation in an house, or in a part of it, may assign over and let out his right to another, unless the instrument, from which he derives his title, bears some condition to the contrary: and the right of habitation, as well as that of use, if simply given, continues during the life of him, who possesses it *Cod.* 3. *t.* 33. *l.* 13. *de usufructu et habitatione. ff.* 7. *t.* 8. *l.* 10. *sect.* 3. Harris.

§ 4. *De Pecorum usu*, p. 94. *Pindar v. Wadsworth*, 2 East, 155, is an action by a commoner for taking away the dung from a common: it was found that the plaintiff's injury would not amount to more than a farthing: held that the action would lie.

§ 6. *Transitio*, p. 94. By the civil law in Justinian's time, there were three modes of acquiring title in common use: to wit, legal adjudication: transfer by operation of law: and usucapion including prescription. Transfer by mancipation, and by legal cession were out of use. L. 11. Cod. de usucap. transf. Cujas ad loc. Ulpian fragm. tit. 19. Ferriere.

Tit. 6. *Præcipua usucapionis requisita. viz. &c.* p. 95. See 2 Blacks. Comm. 263.

Et ideo constitutionem.] *vid. Cod.* 7. *t.* 31. *l. un. De usucapione transformanda, et de sublata differentia rerum mancipi et nec mancipi.* By the common law of *England* the time of prescription is that time, of which there is no memory of man, or *record*, to the contrary; for if there is any sufficient proof of a record or writing to the contrary, although it exceeds the memory or proper knowledge of any man living, yet it is deemed to be within the memory of man: and this is the reason, that regularly a man can not prescribe or allege a custom against an act of parliament, because it is the highest proof and matter of re-

cord in the law. *Co. Litt.* 115. But, although a prescription is said to be constituted by a portion of time, which exceeds the memory of man, yet this is not *always* true; for our laws admit a great variety of prescriptions; which for the sake of order may be divided into two sorts;——into those, which secure us from loss and punishment; and into those, which enable us to acquire a property.

The statute of the 31st of *Eliz.* cap. 5. bars all popular actions on account of offences by a prescription of two years, in the case of the king, and by a prescription of one year, when there is an informer. Other penal statutes allow different periods to prescribe in———as one year; (3 *H.* 7. c. 1. 21 *Eliz.* c. 4.)———six months; (5 *Eliz.* c. 5.)——— three months; (1 *Edw.* 6. c. 1.)———one month; (23 *Eliz.* c. 1.) &c. &c. &c.———and, by the common law, if a man is acquitted upon an indictment of murder, he may after a year and a day plead prescription against any appeal brought by the wife, or the next of kin to the party killed. *Natura brevium* 624. *G.*———Things immoveable also, whether corporeal or incorporeal, are variously prescribed to. The most usual prescription is that, which is called emphatically *the longest*, and extends beyond the memory of man; for whoever will prescribe against another in regard to the maintenance of a chaplain to celebrate divine service, the repairs of a church, an annuity, or any service in his fee, he must prove them to have been time out of mind, or he does nothing. But there are prescriptions of a shorter time, as of 40 years in the case of predial tithes, by the 2d and 3d of *Ed.* VI.— of five years for lands and tenements, when a fine hath been lawfully acknowledged with the due proclamations. (4 *Hen.* 7. c. 24.)———of three years, when lands and tenements, gotten by forcible entry, have been so long held in quiet possession; (8 *H.* 6. c. 9.)——of a year and a day for a villein to assert his liberty against his lord, if the villein has continued so long in antient demesne, or in any of the king's cities or towns, without being claimed or molested.——of a year and a day for the confirmation of any deed made by one, who is in prison, unless he who made it, doth in the interim revoke it.——Also of a year and a day, to hinder the entry of him, who, having omitted to make continual claim, endeavours, after a descent cast, to recover lands and tenements, of which he hath been unjustly disseized. *Co.* 1. *inst. page* 250, &c. *of continual claim.* But prescriptions do not take place in all things. No man can prescribe, for example, to things not in commerce, nor to those, of which the king is properly the sole lord; nor to a custom, which is repugnant to reason or good manners. *Co. Litt. lib.* 2d. *sect.* 212. *of villenage.* And it is a known maxim, in the

laws of *England*, "that no prescription in lands maketh a right." *Doct.* and *Stud. Dial.* 1. *cap.* 8. *Cowel's inst. h. t. Wood's inst.* 297, 298.

The following observations extracted from Ferriere, are worth attention; Blackstone in his note f. 2 Comm. p. 264, is accurate, when he speaks of usucapion being the same with prescription, but the observation is true under the Justinian code only.

Usucapion is the right acquired by the long possession of any thing substantial and corporeal to the exclusion of the real owner, or of a creditor by pledge. Usucapion arose from the law of the 12 tables. Prescription was in its origin, a creature of prætorial edict. Usucapion, was perfected by one year's possession of a moveable, and two years of an immoveable chattel: prescription required ten years as against parties present, and twenty years as against parties absent. Usucapion did not, while prescription did, take place as to incorporeal hereditaments, as services incident to estates. Usucapion transferred the property of the thing itself. Prescription operated only in bar of the right of the owner or mortgager. Justinian however seems to have converted usucapion into prescription, and action therefore lies under the Justinian code, to recover the possession of prescriptive property. Cod. de usucap. transform. An original, fair and bona fide possession by the prescriber, was necessary to support this title, without knowledge at the time of any fraud or deceit upon the real owner: though if such knowledge accrued afterwards, the usucaptor or prescriber, was not therefore bound to give up the property, if he originally came by it honestly on his part. Nor could this kind of title, support a right to things originally stolen, or forcibly acquired. Nor in certain cases to fiscal or imperial property. Cod. ne rei domin. Lex 18 *ff.* de usurp. et usucap. Lex 96. § 1. *ff.* de Legat. Lex penult. Cod. de præpos. sac. cub.

§ 2 *De rebus furtivis et vi possessis*, p. 96. *Aliis quoque modis.* See Dig. 17. 1. 57. Dig. 41. 3. 36. 1. Dig. 41. 7. 3.

Quod autem ad eas quæ solo contenentur. See Cod. de præscrip. long. temp. et de præscrip. 30 vel 40 ann.

The English law respecting goods purchased out of market overt, will coincide with the doctrine here laid down. How far sale in market overt protects property, and concerning the restrictions attending the sale and purchase of horses particularly see 2 Blacks. Comm. 449, and Wood's inst. of the laws of England 210, 211. *In Wilkinson v. King*, 2 Campb. 335. it was determined that the owner of goods having sent some lead to a wharfingers in Southwark, where lead was accustomed to be sold,

and the wharfinger sold it to a bonâ fide purchaser, without authority from the owner, the latter might bring trover against the purchaser: because a wharf where goods of various kinds are deposited, cannot be considered as market overt for the purchase and sale of goods.

I observe the judges of the supreme court have not adopted the statutes of England as to the sale of horses, as part of the law of Pennsylvania. Nor do I find any reported decisions upon the subject. Hence I presume the general principles of the English law will prevail here: viz. that every fair is market overt for the property, for the sale whereof, the fair is held under the law authorizing it. That every store is market overt for the goods usually sold at such store, unless the sale be to a person cognizant of fraud in the storekeeper, to an infant, or to a feme covert of goods not usually purchased by feme coverts. Provided also, the sale be made in all respects in the accustomed manner.

The other part of this section contains the principles that relate to bonâ fide purchasers without notice; see the cases collected in 2 Fonblanque, 151. and Sugden, (law of vendors) 119. 476–479. 488. to which add 2 Vez. jun. 458. *Jerrard v. Saunders.* 9 Vez. 24. *Walwyn v. Lee.* The following cases determine that notice of an act illegal or not legally conducted, will not affect the purchaser, *Tonkins v. Ennis*, 1 Eq. Ca. Ab. 334. 5 Co. rep. 60. *Chapman v. Emery*, Cow. 280. *Doe v. Routledge*, Ib. per lord Mansfield 711. *Bushel v. Bushel*, 1 Schoales and Lefroy's rep. 92–103. *Latouche v. Lord Dusany*, Ib. 137. 157.

Aliis quoque modis, p. 98. Dig. 17. 1. 57. Dig. 41. 3. 36. 1. Dig. 41. 7. 3.

Quod autem ad eas quæ solo continentur, Cod. de præscrip. long. temp. et de præscrip. 30. vel 40. ann.

§ 6. *De errore falsæ causæ*, p. 98. Dig. 41. 3. 27. Dig. 41. 6. 1. Dig. 22. 6. 4. Dig. 41. 4. 11. Dig. 41. 10. ult. 1.

§ *De accessione possessionis*, p. 99. *Quod nostra constitutio*, Cod. 7. 31. lex unic. de usucap. transf.

Yet in chancery the taking of an estate with notice of prior title is *dolus malus*, Dig. 4. 3. *Le Neve v. Le Neve*, 3 Atk. 654. Amb. 446. S. C. and to the same purpose.

§ 8. *Inter venditionem quoque et emptorem*, &c. p. 99. Dig. 41. 3. 14. Dig. 44. 3. 5. Dig. 41. 2. 13. 4. But if the possession of the seller was fraudulent, though that of the buyer was fair, the times could not be joined. Dig. 41. 2. 13. 1. but the buyer must take commencement from his own fair purchase. Dig. 44. 3. 5. Still if the pur-

chase being with knowledge was fraudulent, the buyer could take no benefit by prescription. These rules were not so strict in cases of heirs, who took the titles of the deceased such as they were. Dig. 50. 17. 59.

§ 9. *De his qui a fisco aut Imp.* &c. p. 99. *Edicto Divi Marci.* Cod. 2 37. 3.

Constitutio autem. Cod. 7. 37. 2. exception as to the property of minors.

Divina Constitutio. Cod. 7. 36. 3.

Lib. II. Tit. 7. § 1. *De mortis causa donationibus*, p. 100. By the civil law, donations *mortis causa* required three circumstances to accompany them; 1st. They should be made under expressed apprehension of death: 2ndly. In the presence of the donee: 3rdly. They were revocable on the recovery of the sick person. A filius familias, might with the consent of his father, make a donation *mortis causa*, though he could not make a will. Dig. 19. 6. 25. As to their revocation, see Dig. 34. 5. 19 & 22 & 23 & 12. *de rebus dubiis.* These donations were invalid as against creditors: *sicut legata non debentur, nisi deducta ære alieno aliquid supersit, nec mortis causa donationes debentur, sed infirmantur per æs alienum.* Dig. 35. 2. 66. 1. herein agrees the English law, *Drury v Smith*: *Smith v. Casen*, 1 P. Wms. 405. See further as to donations *mortis causa*, *Lawson v. Lawson*, 1 P. Wms. 441. *Miller v. Miller et al.* 3 P. Wms. 357. *Allen v. Arme*, 1 Vern. 365 *Douglas v. Ward*, 1 Ch. Ca. 99. *Ward v. Turner*, 1 Vez. sen. 431. and the cases therein cited. *Blount v. Burrow*, 1 Vez jun. 546, same case in 4 Br. Ch Ca. 72. *Hughes v. Hughes*, Finch's prec. in chan. 269. *Jones v. Selby*, Ib. 300. *Hassel v. Tynte*, Campb. 318. *Ward v. Turner*, 1 Dick. 171. Whether a donation *mortis causa* may be by deed without delivery, see *Johnson v. Smith*, 1 Vez. sen. 314, compared with *Tate v. Hilbert*, 2 Vez. jun. 111. 4 Br. Ch. Ca. 286, and the observations of the Chancellor in *Antrobus v. Smith*, 12 Vez. 41. By the civil law such a gift might be by writing.

§ 2. *De simplice inter vivos donatione.* Not only notorious ingratitude would give a right to reclaim the gift, Cod. de revocat. donat. but the subsequent birth of children, Dig. 35. 1. 102. It might be by writing. 2 Just. Inst. 1. 7. 2. Cod. 8. 54. 3 & 35. § 5. Delivery is incident to a gift, 2 Blacks. Comm. 441. If unaccompanied by delivery it amounts only to a contract, and this requires a consideration to support it. Ib. See also *Tate v. Hilbert*, 2 Vez. jun. 111. 4 Br. Ch. Ca. 286 and the Chancellor's observations on Dig. 39. 6. 27. page 293 of that case in Brown. See also the case of *Hassel v. Tynte*, Ambler,

318, and Kent's remarks in *Noble v. Smith et al.* 2 Johns. N. Y. Rep. 35, who observes very truly that the dictum ascribed to lord Coke in *Wortes v. Clifton*, 1 Roll's rep. 61. that by the civil law a gift of goods was not valid without delivery, but that it was valid by the English law, is untenable in both respects.

§ 3. *De donatione ante nuptias vel propter nuptias*, p. 102. These were of two kinds, marriage presents, *sponsalia largitas*, and gifts in some sort by way of jointure, *dotis compensandæ causa*. Formerly (that is in early periods of the Roman law) these could only be made before marriage, *Cod. L.* 17. *de donat. ante nupt.* and *Cod. L.* 8. *de repud:* but Justinian permitted this second kind, to be made also after marriage. *Lex ult. Dig. de eodem.*

How far such donations will be supported as against creditors see *Randall v. Morgan*, 12 Vez. 74. and the cases there referred to: also *Kidney v. Coussmaker*, 12 Vez. 155.

§ 4. *De jure accrescendi*, p. 103. See post Inst. III. 4. 4. In *Grant v. Kearne*, in the common pleas at Northumberland, a case of a tract of land taken up in the joint names of *William M'Murray* and *George Grant*, I held that the doctrine of survivorship did not apply. These cases seemed to me, cases of partnership, rather than jointenancy. In June 1812, the supreme court, to which *Grant v. Kearne*, was removed by error, agreed in opinion with the court below, and held that the right of survivorship did not attach upon property so held. In wills, the court of chancery leans against the *Jus accrescendi*. 4 Vez. 551. *Russel v. Long*.

See 1 Cod. de comm. serv. Manumitt. and Dig. 18. 1. de contr. empt.

Tit. 8. *Quibus alienare licet*, p. 104. Consult on the right of the husband to aliene, Cod. de rei vendic. Cod. de jur. dot. Cod. de rei uxor. act. Dig. 23. 3. Dig. 23. 5. Dig. 23. 4.

Remedium imposuimus. Cod. 5. 13. 1. unic.

See *Woollands v. Crowcher*, 12 Vez. 174. as to the necessity of the wife's consent and the mode of taking it. Also *Murray v. Lord Elibank*, 13 Vez. 1. and *Sturgis v. Corp*, 13 Vez. 190. and *Essex v. Atkins*, 14 Vez. 547. where the court at last determined that a married woman may bind her separate property, without the assent of her trustees, unless their assent be made necessary in the trust deed.

§ 1. *De creditore, qui licet non sit dominus*, &c. p. 105. *Constitutione consultum est. Cod.* 8. 34. 3. *de jur. dom. impetr.* see also post Inst. III. 154. Dig. 13. 7. 9.

As to the difference between a pledge and a mortgage, and in what cases the creditor may dispose of the pledge, see *De Mainbray v.*

Metcalfe, Prec. in ch. 419. and 2 Vern, 691. *Jones v. Smith*, 2 Vez. jun. 378. and *Cortelyou v. Lansing*, 2 Caines' cases in error 202. A mortgage is a pledge, of which the absolute interest vests in the creditor at a fixed time, if the debt be not satisfied. A pledge cannot be sold even during the lifetime of the debtor, unless after previous demand, and reasonable notice by the creditor, who has not the property in the pledge, but a lien only on it.

§ 2. *De pupillo qui licet Dominus*, &c. p. 105. The law of England is the same with that here laid down. If an infant deliver money to a person, it may be recovered in an action of account. See the authorities collected in 1 Com. on Contracts, 148.

§ 3. *Continuatio*, p. 106. The reason of the law here laid down respecting tutors and pupils, extends to minors and curators. L. 5. Cod. de in integr. test. minor, Dig. 45. 1. 6. Dig. 26. 5. 8. 3.

As to the consequences of pupillage by the civil law.

1st. The pupil is not entitled to an obligation for money lent by him, because he cannot transfer the property of the loan to the borrower. Dig. 26. 8. 9. Hence the borrower becomes liable to the *condictio certi quasi ex mutuo*, Dig. 12. 1. 11. § ult. Dig. 12. 1. 12. Dig. 12. 1. 19. 1. If the borrower had spent it malâ fide, the action *ad exhibendum* lay, in which damages beyond the principal might be recovered. § *infra de off. jud.* Dig. 12. 3. 3. 2ndly. Neither could the pupil pay a debt; but if the creditor received it, and employed the money bonâ fide, he was answerable. Dig. 46. 3. 14. ult. and 26. 8. 9. 2. 3rdly. A debtor could not pay his pupil-creditor, unless under the authority of the tutor. Dig. 46. 3. 15. But if the money either remained, or was expended by the pupil in necessaries, it could not be demanded a second time: the debtor might plead in bar, exception of fraud. Dig. 44. 4. 15 and 44. 4. 4. 4 Dig. 46. 3. 47 and 46. 3. 66. But Justinian required a judgment to authorise the payment even under the authority of the tutor in cases above a certain sum. L. 25 and L. 27. Cod. de administr.

Tit. 9. § 1. *De liberis in potestate.* p. 107. *Peculium* is the private property, that slaves or sons of families might acquire independent of the master or father.

Peculium castrense, was the acquirements of the son during actual military service.

Peculium quasi castrense, was the acquirements of the son *in militiâ togatâ et inermi*, or in the imperial household, or by means of some ecclesiastical benefice, or legal employ.

Peculium adventitium, was the property acquired by the son by his own industry, by bequests on the maternal side, or by the liberality of friends.

Peculium profectitium, was the gain made by the son, on the father's stock or capital.

The father's absolute authority over the property of the son was first taken away with respect to the *peculium castrense*. Dig. 37. 6. 1. 5. Dig. 39. 17. de castr. pec.

Next as to the *peculium quasi castrense*. Cod. de castr. omn. palat. pecul. see also post Inst. 2. 11. 6.

As to the *peculium adventitium*, it was modified by the Theodosian Code, de matern. bon. and de bon. qu. liber. and by the Justinian Code of the same title.

The *peculium profectitium*, remained subject to the fathers' claim according to the present section.

By the Code Civil Nap. Fathers have a right to the property of their children until the age of eighteen, or previous emancipation: that property excepted which was acquired by the personal industry of the child. Art. 372. 384. 387.

In England and in this country the father is entitled only to the earnings of the child until he be of full age. If any property descend or be given to the child, the father is no more than a trustee and must account when the son is of age. 1 Bl. Comm. 453.

§ 2. *De emancipatione liberorum*, p. 108. *Ex anterioribus constitutionibus*. lex. 1. and lex. 2. Cod. Theod. de maternis bonis.

Ideoque statuimus. Cod. 6. 61. 6.

The French code allows of emancipation by the father, or by the mother if the father be dead, at the age of fifteen. But a son deprived of father and mother cannot be emancipated till eighteen. An emancipated minor can do no acts but such as are merely administrative: he cannot borrow without the advice of family counsel: his bargains may be moderated when excessive. He is considered as of age as to his trading, if he enters into trade. Art. 476 487.

§ 3. *De servis*, p. 108. The history of slavery in England and the history of villeinage as connected with it, is well treated in Hargreave's argument in the case of *James Somerset, the negro*, XI. State trials p. 339. He was a heathen or unbaptized negro. I have already referred to the supposed efficacy of baptism in *Sir Thomas Grantham's* case, 3 Mod. 120.; a superstition very creditable to the christian religion. Even so late as 5 William and Mary in the case of *Gelly v Cleve*, cited in *Chamberlain v. Hervey*. 1 Lord Raym. 146. it was deci-

ded that trover would lie for a negro boy, *for they are heathens and therefore a man may have property in them.*

Since the decision of *Somerset*, the cases relating to slavery are few. In 3 Espinasse's Nisi Prius Reports, p. 3. Easter term, 1799, I find the case of *Alfred v. the Marquis of Fitzjames.* Assump. for servants wages. Plaintiff proved the time he had served, and relied on a quant. mer. Lord Kenyon determined, that unless there was an agreement for wages during the time of his service in England, the negro could recover none.

I have thought it expedient to add here, the reported cases respecting slavery in the American books, (except 2 Bay's S. Carolina Rep.) From which some idea may be obtained of the legal situation of negro slaves. I have not the opportunity of referring to the various acts of assembly passed on this subject in the several states to the southward of Pennsylvania, and the present notices on the subject will of course be defective, but they will be relevant so far as they extend. In the preceding part of the notes page 410. I have treated at some length the general subject of slavery; to which this note may be considered as an addition.

To the northward and eastward of New York and Pennsylvania, slavery is so nearly abolished, that I do not think it necessary to trace the laws concerning it. In Massach. Rep. 123. *Winchendon and Hatfield*, and Ib. 539 *Dighton v. Freetown*, there are some cases as to the township settlement of slaves, but of no importance.

By an act of the general assembly of the state of New York, 22 Feb. 1788, and by another act of April, 1801, persons bringing slaves into the state of New York, are prohibited under a heavy fine from selling or transferring them as slaves, or for any period whatever. Under these acts in the case of *Link v. Beuner*, 3 Cains 325. A. D. 1805. a transfer of the time of a slave for 20 years, the slave to be manumitted at the age of thirty eight, was held to be a transfer of the slave himself, and invalid. This was agreeable to a former decision in *Fish v. Fisher*, there cited, and to one of the points in *Sable v. Hitchcock*, 2 Johnson's cases, 79. confirmed in error in 1802. But persons acting merely in the capacity of executors, trustees, assignees of insolvent debtors, sheriffs, &c. would not be liable to the penal clause of the act. The same point was decided in *Fish v. Fisher*, *Ib.* 89, which was the case of a slave running away from his master living in New Jersey, and pursued into New York, where he was sold: on the principle, that this might lead to the evasion of the act, which was designed to stop the importation of slaves into New York state.

In the case of *Tom* a negro, the owner gave him a certificate in writing stating that from and after the decease of the owner, *Tom* was manumitted. After this, the owner sold and delivered the slave for a valuable consideration. Held, that notwithstanding this transfer, the negro became free at the death of his former owner, who gave him the certificate. 5 Johns. N. Y. Rep. 355. Same point settled afterward in *Ketletas and Fleet.* 7 Johns. N. Y. Rep. 324. In *Hart v. Cleiss*, 8 Johns. N. Y. Rep. 41. Where a slave is exported or attempted to be exported by a stranger, without the privity of the master, the slave does not become free, but the stranger is liable to the penalty of 250 dollars.

In Pennsylvania, by the acts of 1 March, 1780, and 29 March, 1788, all the negroes born within the state since the first of these acts, can only be held in servitude till the age of 28. Persons claiming slaves born before that act, were required to register them. Strangers, persons not inhabitants of Pennsylvania, nor meaning to become resident therein, passing through the state are protected in their rights to their attendant slaves for a period of six months. But all slaves imported into Pennsylvania by persons inhabitants of or resident within this state, or who shall come with an intention of residing in Pennsylvania, cannot claim the benefit of this clause, but their slaves on arriving here, become free. No negro or mulatto slave shall be removed, by force, or seduced out of the state, without his consent, under a penalty of two hundred dollars against the offender, with confinement to hard labour for 12 months. No husband, wife, parent or child, during the allowed term of servitude, shall be transferred, &c. so as to be separated more than ten miles.

On these acts, and the general doctrine of slavery the following decisions have taken place in Pennsylvania.

As villeinage never existed in Pennsylvania, no part of the doctrine founded on that condition is applicable here, 1 Dallas Rep. 167. Hence the common law doctrine that the child follows the condition of the father, and therefore that a bastard is always free, being founded upon the old English law respecting villeinage, is not applicable here. We follow the civil law rule, that *partus sequitur ventrem.* Chief Justice M'Kean, noticed a species of slavery in England distinct from villeinage mentioned by Swinburne 6th edit. 84. And this being the case of a slave born and purchased in Maryland, he supported the doctrine of the lex loci; agreeably to *Smith v. Gould*, 2 Salk. 666. in which there is much curious matter as to slaves, and villeins, but it does not support the chief justice's position as to the lex loci: nor is the

report of the same case more in point in 2 Lord Ray. 1274, and it is not supported by *Pearne* v. *Lisle*, Ambler 76, or *Chamberlain* v. *Harvey*, 1 L. Raym. 146. But I think the application of lex loci, was perfectly right in the Pennsylvania case. In *Smith* v. *Gould*, lord Ray. 1274, it is said that if A. takes B. a Frenchman captive in war, he cannot maintain his action *quare cepit B. captivum suum gallicum*, which may bear upon the right of slavery as deduced from the rights attached to taking captives.

Property in a negro may be obtained by bona fide purchase without deed, see M'Kean, in the above case of *Pirate al Belt* v. *Dalbey*, 1 Dall. Rep. 169. A negro born before 1st March, 1780, and not recorded agreeably to the provisions of that act, is absolutely free. *Respublica* v. *negro Betsey*, 1 Dall. Rep. 469.

Where the jury make the price of a negro slave, the measure of damages in a writ of homine replegiando, if it be accepted by the master, it will in equity, and perhaps by operation of law also, emancipate the negro. *Cowperthwaite* v. *Jones*, 2 Dall. Rep. 57.

In *Jack* v. *Eales*, 3 Binney, 101, the court decided that an omission or mistake by the clerk, in the record of entry of a negro or mulatto, might be rectified according to the verdict of a jury on hearing evidence of the fact. This does not go quite so far as the case of the *Commonwealth* v. *Blaine*, wherein the entry follows the written return signed by the defendant herself; and which is under a different act of assembly. The owner ought not to be damnified by any mistake of a public officer, but in the latter case, the court decided she could not be damnified by her own, but might be allowed to set it right by testimony. The case is not yet reported, but I understand it was in substance, as follows, viz. *The Commonwealth* v. *Sarah E. Blaine*, in error determined at Chambersburgh, before Tighlman, Yeates, and Brackenridge, Sept. term, 1811.

Habeas corpus for a negro boy: defendant claimed him as her slave regularly registered under the act of assembly. It appeared, that the slave was registered on the 26th June 1807, and the affidavit accompanying the return was dated on the same day; but both in the registry and return, the slave was stated to be born on the 2nd of January, 1808, *six months after the registry took place.* It was contended on the part of the slave, that this registry, was not within the letter or spirit of the act, which intended a record that should supercede the necessity of parol proof as to the period of the commencement of the servitude: it was meant as a protection to the slave from imposition. The time of birth of a negro child being in its nature a fact of no great notoriety, could

scarcely be expected to be ascertained by parol at the distance of 28 years, when it would be impossible for the slave to find the witnesses, or know who they were if they still survived.—Hence, the necessity of recording the true period of time. The record in the present case, is untrue on the face of it; nor can it be good in part and bad in part: if the mistress can hold the slave under it, she can oblige him to serve until 28 years have elapsed from the period mentioned in the registry, which would be manifestly unjust—If the only operation of the act, is to oblige the master to make a registry of some sort no *matter whether true or false*, within six months after the birth, what was originally meant as a substantial benefit to the slave, may be turned into a matter of form and idle ceremony. The slave has a vested interest in his freedom, if every thing required be not complied with by the master. And farther, that agreeably to the spirit of the act, and the liberality of the times, a doubtful claim should be construed in *favorem libertatis*.

On the other hand it was argued, that the act in question did not change the nature of the property: that the slave was still the property of the owner; a chattel: and that every thing done or to be done, respecting him, must be construed agreeably to the analogy of all laws relating to property: that a manifest ambiguity or mistake on the face of the instrument, might be explained and set right by testimony: in the present case, no more was asked, than that an impossible date should be correct-rected by the real fact.

The court coinciding with this reasoning, remanded the slave into the custody of his mistress: and observed, that the registry was not conclusive on either party, but might at any time be rectified according to the true state of the facts, whether brought forward by the claimant or by the negro: and if the latter, after having served out his 28 years counting from the true time, could make out by parol or any other proof that might be in his power, that he was born at a period earlier than that mentioned in the registry, the court would discharge him. Judge Yeates said, the first decisions on the act of assembly went the length of liberating nearly all the slaves registered under it; but that the current of late decisions set entirely the other way, and that every thing like strictness of form was dispensed with, to get at the merits.

The various acts of assembly of the state of Pennsylvania, respecting the class of servants called German redemptioners, (2 Smith's Pennsylvania laws, p. 329.) hardly fall under the subject now in discussion.

The legatee of slaves for life, is entitled to the issue born during the life estate, *Scott v. Dobson*, 1 Harris and M'Henry's Maryland Rep. 160.

The issue of slaves goes to the person to whom the use is limited. *Somerville v. Johnson.* Maryl. rep. 348.

How far manumitted slaves may inherit, and whether slaves are capable of a legal marriage? Dulany's opinion. Ib. Appendix, 557.

Under the Maryland law of 1663, by which the issue of a freeborn white woman intermarrying with a slave, shall be slaves, and under the act of 1681, ch. 4. repealing that law, it was held, that issue born after the repealing law were slaves, if the marriage took place before the repeal. *Butler v. Boarman.* Ib. 371.

Money directed by will to be laid out in slaves, and annexed to lands devised in tail by the same will, is to be considered in the same light as slaves and will go with the land. *Dade v. Alexander*, 1 Wash. 30.

As to Indian slaves: what Indians could be made slaves and what could not. *Jenkins v. Tom.* 1 Wash. 123.

Since 1705 no American Indian could be made a slave in Virginia: but foreign Indians might. *Dick v. Coleman*, 1 Wash. 239.

Slaves are chattels, and assets for the payment of debts, where there is a deficiency of other personal estate. *Walden v. Payne*, 2 Wash. 7.

Slaves are real estate only in particular cases such as descents. Ib.

Nor is an executor bound by order of a county court directing a distributive division of a testator's estate, to deliver up the slaves without reserving a sufficiency to pay debts, or taking refunding bonds. Ib.

Where white persons, or native American Indians or their descendants in the maternal line, are claimed as slaves, the onus probandi lies on the claimant. *Hudgins v. Wrights*, 1 Hening and Munford, 134. Otherwise with respect to native Africans and their descendants.

No native American Indian could be made a slave in Virginia since 1691. Ib. and *Pallas et al. v. Hill et al.* 2 Hen. and Munf. 149.

A negro claiming freedom under the law of 1792, on the ground of having been brought into this state, it must appear that he was detained by compulsion and contrary to law, *Henderson v. Allens*, 1 Hen. and Mun. 235.

Slaves emancipated by last will and testament, may be sold for a term of years to satisfy the debts of the testator, if there be not sufficient assets without: *Patty, &c. v. Colin, &c.* 1 Hen. and Mun. 519—531.

If a slave hired for a year, be sick or run away, the tenant must pay the hire, otherwise if the slave die without any fault on part of the tenant: in which case, the owner loses the hire from the time of the slave's death. *George v. Elliot*, 2 Hen. and Mun. 5.

If an executor sells the slaves of a testator, without any necessity for so doing induced by debts, and buy them himself, the sale may be set aside. *Anderson and Starks v. Fox*, 2 Hen. and Mun. 245.

A father possessed of ample fortune, having sent several slaves to his daughter, soon after her marriage, which slaves continued with her and her husband till the father's death, twenty eight months afterward, they were held to be a gift in consideration of marriage, and the husband entitled to keep them against the creditors of the father. Hen. and Munf. ub. sup.

Three witnesses are necessary in deeds of trust, or mortgage of slaves, unles the same be acknowledged by the party. *Moores's Exor. v. the Auditor*, Ib. 232.

Construction of the stat. of frauds and perjuries as to the loan of slaves, *Beasly v. Owen*, Ib. 449.

In order to annex slaves to land, it was necessary that co-extensive estates should be given in both. *Dunn v. Bray*, 1 Call's Virginia Rep. 338.

Slaves recovering their freedom, are not entitled to damages for detention. *Pleasants v. Pleasants*, 2 Call's Rep. 319.

Evidence of a parol gift of slaves cannot be given, under the act of 1758, but such testimony may be received to prove a five year's possession, so as to bar a plaintiff's demand. *Jordan v. Murray*, 3 Call's Rep. 85.

2 Cranch, *Adams qui tam v. Woods*, 336, and the *United States v. the schooner Sally*, are cases under the act of Congress of March, 1794, abolishing the slave trade in 1808.

Scott v. the Negro London, 3 Cranch, 324. A slave brought into the state of Virginia, by an Act of 17 Dec. 1792, and kept there a year, shall be free, unless the owner within 60 days of his arrival in the state, shall make oath that he did not remove thither, or bring slaves there with intent of evading the laws of Virginia, as to the importation of slaves. A slave brought there, and detained for more than a twelve month, by a person claiming him, but who was not the true owner, shall not acquire his freedom by this means, to the injury of his true owner.

Spiers v. Willison, 4 Cranch, 398, and *Ramsey v. Lee*. Ib. 401. By act of Virginia, 1758, and by the law as it stood in 1784, no gift of a slave was valid, except made in writing and recorded.

Five years possession of a slave, will entitle the plaintiff in detinue to recover, but without prejudice to the titles of those who were not

parties to the suit, *Newby's admrs. v. Blakey.* 3 Hen. and Mun. 57. And so in trespass, *Brent v. Chapman*, 5 Cranch, 358.

A person convicted under the negro act of South Carolina, of killing a negro, and committed for the forfeiture of 700 l. currency, is not entitled either to prison bounds, or the insolvent debtor's Act. *The State v. Gee*, 1 Bay's Rep. 163.

By another act of South Carolina, if any slave shall suffer in life or limb, when no white person is present, the owner or other person who shall have the care of, or in whose possession or power such slave shall be, shall be deemed guilty of such offence, and proceeded against accordingly, without further proof, unless such owner or other person, do make the contrary appear by evidence, or exculpate himself by oath. Per Cur: this permission of exculpating by oath, is given by the act only to masters, overseers and others, having negroes under their care. They held it did not extend to the master of a vessel, who had taken up the negro on some pretext or other, and to prevent the negro's escaping, had thrown a lead line about his neck, by which he was strangled. Defendant was convicted of manslaughter and fined 50l. sterling. *The State v. Welch*, 1 Bay's Rep. 172.

A master permitting a negro wench to work for herself, or hire herself out, paying him certain stipulated wages, who by her industry and frugality saves as much money as enables her to purchase a negro girl in order to give her freedom, such negro girl shall be deemed free, and not the property of the master. *The guardian of Sally a negro v. Beatty*, 1 Bay's Rep. 261. The defendant's case was argued on the grounds of the civil law, by which as Blackstone alleges, even the price paid to the person becoming by contract for a certain price a slave for life, belongs to the master. 1 Bl. Com. 425. A doctrine however, which could not be supported on principle, even where slavery such as among the Romans was prevalent; for the slavery of the party depending on the consideration of the price given, the instant the master forcibly deprived the slave of the price, the slavery would cease. The condition in which the seller put himself, was that he might have the free use of the sum stipulated as the purchase money, and this being seized on by the master, the contract itself is put an end to.

A negro found by accident on leased premises is not liable to be distrained for rent. *Bull v. Horlbeck*, 1 Bay's Rep. 301.

A negro with two white men, though under their controul, is a person in law who may be deemed a rioter. *The state v. Thackam and Mason.* 1 Bay's Rep. 358.

In addition to the Pennsylvania cases, relating to negroes and slaves,

the reader is referred to 1 Smith's Edit. of the laws of Pennsylvania, 497.

In 1798, or thereabout, Judge Rush, at Sunbury, determined in the case of the *Negro Tash*, that the *onus probandi* of proving his freedom lay on the negro claimed as a slave. This would be good law in the southern states, but I doubt it in Pennsylvania, where the laws provide so sedulously for the emancipation of negroes.

§ 4. *De fructuariis et bona fide*, &c. p. 110. see Dig. 41. 1. 10. 3 and 4. Subject however to Dig. 7. 1. 21. et seq. and Dig. 41. 2. 45. et ult.

§ *De reliquis seu extraneis personis*, p. 111. *Divi severi constitutionem*, Cod. 7. 32. 1.

Tit. 10. *De testamentis ordinandis*, p. 112.

I consider the right of conveying by devise, as a creature of positive law, to be permitted or modified in harmony with the institutions of the country, and according to the spirit and knowledge of the times. What right has a man over property when he is no more? or whence does he derive it? or how is he to enforce it? The earth, the air, the water, vegetables, and minerals, are manifestly placed here for common benefit. Man can but enjoy the usufruct of them while he lives: when he ceases to live, he can neither derive enjoyment from them, or exercise controul over them. He found them here, subservient to his convenience; and when dead, he must leave them to the convenience and controul of those who come after him.

All that a man can claim the right of devising, if he can claim any right at all, is the additional value he has bestowed upon natural objects, by the exertion of his skill and industry upon them; but even this he has no means of enforcing after death: and if he calls upon society to enforce the right, it must be on such terms as society thinks fit to impose. This subject is put in a strong light in *Dr. Ogilvie's* tract on the right to property in land: and the discourse of *Bigot-Preameneu* on Donations *inter vivos*, and the theory of the law of last wills, is well worth perusing. It contains also a good exposition of the reasons whereupon the French code has varied in some respects from the Roman, as in the rejection of *Substitutions* and *Fidei Commissa*. 2 Recueil, 361.

Society, however, has generally sanctioned the right of making last wills and testaments, 1st, From a wish to indulge the voice of nature which calls upon the dying to provide for the comforts of near and dear relations by the bequest of that property which can no longer contribute to their own enjoyment. 2dly, To encourage industry, by al-

lowing the industrious to dispose by will of the fruits of their industry, and protecting that disposal, when made in conformity to the directions of law. These motives of permission, will leave great latitude as to the restrictions that may be thought necessary to fulfil the public views. Thus in a country like England, where institutions partake of the spirit of the feudal times, and where primogeniture calls for exclusive privileges, the law will be favourable to accumulations at the expence of the younger branches of a family: in such a government as ours, where no reason of this kind prevails, we might properly direct or restrict the general licence of testamentary dispositions, upon principles more agreeable to natural equity. Solon first permitted the Athenians to make a will; from whom the Romans borrowed the law of the twelve tables, *Pater familias, uti legassit super familia pecuniaque sua, ita jus esto.* The modification of this rule by the *Lex Falcidia*, which permitted a testator to dispose arbitrarily but of three fourths or one half of his property, has been imitated, and properly as I think, by most of the civilized nations of Europe. Indeed when we consider the many capricious, not to say senseless and unjust dispositions of property that take place in countries where an unlimited right of devising is permitted—the neglect of children and relations for the sake of gratifying a selfish vanity, or a death-bed superstition—the culpable fondness of power that would extend for a century or two, or perpetuate if possible, the controul of a weak and dying man over property that he can no longer enjoy, as in the will of Mr. Thelusson—when we consider further, that those whom we bring into existence, have a right to call upon us to make that existence as comfortable as we are able, without unreasonably sacrificing our own comforts—we shall probably incline to think that some restrictions on the right of devising are neither inexpedient or unjust. Our German ancestors, refused the right altogether. *Hæredes successoresque sui cuique liberi, et nullum testamentum*, says Tacitus. *De Mor. Germ:* and such was the law of Greece before Solon, and of Rome till the period of the twelve tables.

§ *De etymologia*, p. 112. *Testamentum ex eo appellatur*, &c. Besides this, several definitions are given of a last will: *Ulpian* defines *et, mentis nostræ justa contestatio, in id solemniter facta, ut post mortem nostram valeat.* The definition of Modestinus is not unlike that. Domat defines a testament, to be the appointment of an executor or testamentary heir, according to the formalities prescribed by law. Dom. L. 1. tit. 1. sect. 1. But this is merely describing the person who is to put the will into execution, rather than the will itself. Aulus Gellius,

and Laurentius Valla laugh at the definition of Justinian, and say that *testamentum* is no more derived from *mens*, than *calceamentum*, *ornamentum*, *salsamentum*, &c. See enough of all this in the marginal annotations to Swinburne on wills, p. 2. The only defect I see, is, that the definition given in the text, will apply to a codicil also. In a will, there must be an executor: there need not in a Codicil. Swinburne's book contains a laborious collection of references to civil law writers on this subject; and to use his own expression (pref.) "May in some sort be profitable to those *Justinianists* or young students of the civil law, who do intend to bestow the fruit of their study in the practice thereof."

Quinque verbis potest quis facere testamentum, ut dicat LUCIUS TITIUS MIHI HÆRES ESTO. Dig. 28. 5. 1 Swinburne, 3, 4, 5.

§ 1. *De antiquis modis testandi civilibus.* p. 112. All these ancient methods are enumerated by Ferriere in loco, but they are of no further importance at present, excepting to shew how long it was, before a little common sense, took place of the absurd fictions on which the ancient customs were grounded.

Per æs et libram. Cujas is of opinion that this kind of last will was abrogated by Constantine, Cod. 6. 23. 15.

Attamen partim. In part only: because the same number of witnesses were still necessary. For though the civil law required but five witnesses, yet the balance holder and the purchaser made seven: and it was to supply the place of these, that the prætorian law added two witnesses to the number required by the civil law. Harris.

§ 3. *De conjunctione juris civilis et prætorii.* p. 113. That a will should be made at one sitting as it were, does not imply that acts of necessity might not intervene, as the giving of physic, &c. but, that there should be no intervention in the nature of business, as buying, selling, &c. L. 28 Cod. h. tit.

A nostra constitutione. See Cod. 6. 23. 29 *jubemus.* Nov. 119 ch. 9.

§ 4. *Solemnitas addita a Justiniano.* p. 114. This solemnity introduced by *lex consultissima*, Cod. h. tit. was again altered by the novel 129. ch. 9. by which he permitted the name of the heir to be written by another.

Hence a will required,

1st. That it should be made without the intervention of other business, either by the testator or the witnesses, while it was drawing up.

2ly. That it should be executed in the presence of seven witnesses, specially convened for this purpose.

3ly. That they should severally seal either the will itself, or the envelope.

4ly. That they and the testator should subscribe it.

5ly. That the name of the heir should be written either by the testator, or by some person at his request.

6ly. That the witnesses should be such as were capable of being heirs or legatees, *(testamenti factio activa)* but liable to the exceptions contained in the sixth section of this title. As, women, slaves, minors under puberty, persons deaf, dumb, insane, or legally disqualified, as persons convicted of libellous verses, &c. Dig. 22. 5. 21. Dig. 28. 3. 5. 9. And Swinburne on wills 345. Persons who had refused when called on to bear testimony. Aul. Gell. Lib. 5. ch. 23. and laterly, heretics lex. 4. Cod. de heretic. lex. 3. Cod. de Apost.

These witnesses if unimpeachable at the time of the will being made, were unimpeachable afterward, Dig 28. 1. 22. Several witnesses might be taken from the same family, but not out of the family of the testator: though the heir might be a witness, and so might a father to the will of his emancipated son, Dig. 28. 1. 20. or to the will of his son, respecting his *peculium castrense*. Dig. 29. 1. 23. 11. Legatees also might be witnesses, Dig. 28. 1. 20. though these provisions seem contrary to the rule, that no one shall be a witness in his own cause. Dig. 22. 5. 20. The notary might be a witness, but he could not receive a legacy in that case: Suet. Nero. 17. Dig. 48. 10. 22. 6 &c. Dig. 34. 8. 5.

§ 5. *De annulis quibus testamentum signatur.* p. 114. An inconvenient dissonance takes place in the United States, as to the necessity of actually sealing an instrument supposed to be sealed. In Pennsylvania and Virginia, a scroll with a pen, and the word seal, or the letters L. S. written therein, is held equivalent to actual sealing. It is not so in New-York state. See the subject discussed in *Warren v. Lynch*, 5 Johns. N. Y. Rep. 239. This was the case of a note drawn in Virginia, but made payable in New-York, and therefore the Lex Loci of New-York guided the decision according to the principle of *Robinson v. Bland*, 2 Burr 1077. *Ludlow et al. v. Van Renseelaer.* 1 Johns. N. Y. Rep. 94 and *Thompson v. Ketcham*, 4 Johns. N. Y. Rep. 285.

§ 6. *Qui testes esse possunt*, p. 114. *Testamenti factio*, is either *factio activa*, which is the right of making a will: or *factio passiva*, the right of taking by will: the latter is the meaning here as I think, on comparing this section with Tit. 19 sect. 4. p. 151, 152. Harris

translates the passage, "who are themselves legally capable of taking by testament."

Sed neque mulier.] Women may be admitted witnesses, by the civil law, in all matters, whether civil or criminal, when the nature of the case is such, that other evidence can not be obtained; but, when the choice of witnesses is altogether voluntary, as in making testaments, and doing many other acts, the civil law will not receive the testimony of a woman. *Domat. lib. 3. t. 1.* The *Romans* had also another reason for rejecting women as witnesses to wills; namely, because women were never suffered to be present at public assemblies, where all wills and testaments were formerly made. But to use the words of *Swinburn*; "whatsoever diverse do write, that a woman is not "without all exception, because of the inconstancy and frailty of the "feminine sex, whereby they may the sooner be corrupted; yet I take "it, that their testimony is so good, that a testament may be proved "by two women alone, being otherwise without exception. *Swin.* of "Testaments, *part* IV. *sect.* 24." And, by the laws of *England* in general, women may be witnesses, sureties, guardians, &c. in all cases, as well as men. Harris.

For a list of civil law authors on the law of evidence, see Hargreave and Butler's Notes to Co. Litt. Index voce *authors*.

§ 7. *De servo qui liber existimabatur*, p. 115. *Adrianus Catoni.* Cod. 6. 23. 1. How far the court of chancery will go in aiding powers defectively executed see *Holmes v Coghill*, 12 Ves. 206, where most of the cases are cited.

§ 8. *De pluribus testibus ex eadem domo*, p. 115. This does not mean, of the family of the testator, otherwise it would be contrary to the spirit of Dig. 22. 5. 6. *Idonei non videntur esse testes quibus imperare potest ut testes fiunt:* to which agrees the following. § 9. *De his qui sunt in familia testatoris.*

§ 11. *De legatariis et fidei commissariis*, p. 116. see the note to § 4. above.

Legatariis autem.] Although it was a general rule in the *Roman* law, that no one should be permitted to bear testimony in his own cause, Cod. 4. *t.* 20. *l.* 10. yet legataries were allowed to give evidence upon this distinction; that they were particular, and not universal successors; and that a testament would be valid without legataries. The difficulty also, which must frequently have occurred, in obtaining so great a number of witnesses, as seven, might probably induce the *Romans* to be less strict, as to the persons, whom they admitted upon this occasion. *Qui testamento hæres instituitur*, says ULPIAN, *in eodem*

testamento testis esse non potest: quod in legatario, et in eo, qui tutor scriptus est, contra habetur. Hi enim testes possunt adhiberi, si aliud eos nihil impediat. ff. 28. t. 1. l. 20. But by the practice of the ecclesiastical courts of this kingdom, which have the sole cognisance of the validity of all wills, as far as they relate to personal estate, no legatee, who is a subscribed witness to the will, by which he is benefitted, can be admitted to give his testimony *in foro contradictorio*, as to the validity of that will, 'till either the value of his legacy hath been paid to him, or he hath renounced it; and, in case of payment, the executor of the supposed will, must release all title to any future claim upon such supposed legatee, who might otherwise be obliged to refund, if the will should be set aside; and a release in this case is always made, to the intent, that the legatee may have no shadow of interest at the time of making his deposition. *Swinb.* 397. The same practice also prevailed at common law in regard to witnesses, who were benefitted under wills, disposing of real estate. And, if a legatee, who was a witness to a will, had refused either to renounce his legacy, or to be paid a sum of money in lieu of it, he could not have been compelled by law to divest himself of his interest; and, whilst his interest continued, his testimony was useless: and this was determined in the case of *Ansley* vers. *Dowsing*, in easter term, 19 *Geo.* 2. Str. Rep. 1254.

But this very singular case, and the unanimous opinions of the judges upon the meaning and intent of the statute of the 29th of *Charles the second*, called the statute of frauds, gave rise to the following act of parliament, made in the 25th year of *Geo. the second:* by which it is enacted; "that if any person shall attest the execution of any will or "codicil, which shall be made after the 24th of *June*, 1752, to whom "any beneficial devise, legacy, estate, interest, gift, or appointment, of "or affecting any real or personal estate (charges on lands, tenements, or "hereditaments for payment of debts excepted) shall be thereby given, "&c. the devise shall, so far only as concerns such person, or any "claiming under him, be void, and he shall be admitted a witness to "the execution of such will." 25 *Geo.* 2d. Harris. See *Twaites v. Smith*, 1 P. Wms. 10. 1 Lord Ray. 85. where it is said that by the spiritual law the son of a legatee is not a competent witness, but by the common law he is.

In quadam nostra constitutione.] Not extant.

See further on witnesses to a bill by the law of England, Swinburn, 343, whose notes embrace also the spiritual and the civil law doctrine on this subject.

In Pennsylvania, we require but two witnesses to a will. Act of 1705.

See the exposition of this, in *Hight v. Wilson*, 1 Dall. Rep. 94, and *Lewis v. Maris*, Ib. 278, and the notes of Mr. Smith, 1 Smith's Penn. laws, 38.

§ 14. *De testamento nuncupativo*, p. 117. By the civil law, the witnesses (in number seven, Cod. 6. 23. 21. 2.) were required within a reasonable time after the death of the nuncupatory testator, to go before a magistrate, and giving an account of what took place, to have a formal statement drawn out and signed. L. ult. si vero Cod. de test.

On the English law of nuncupative wills, see 29. Ch. 2. Ch. 3. Swinb. 355. For the laws of Pennsylvania relating to wills generally, and to nuncupative wills, see 1 Smith's edition of the Pennsylvania laws, p. 33—43, where the chief cases decided in this state, will be found in the notes.

The cases under the head of last wills in the American Reporters of other states, are too numerous to be digested here.

Tit. 11. *De militari testamento*, p. 118. The privilege given to a soldier was merely as to the formal part of his will. If meaning to make a will in the common form though in actual service, but leaving it incomplete, his privilege extended to making it valid, so far as the rules of military testaments applied. Dig. 29. 1. 3 and 38. Hence also he might die, partly testate. L. 6 eodem. or make a relegated person his heir, L. 13. § 2 Dig. eod. or make a conditional heir, L 17 and 41 Dig. eod. or a heir by codicil, L. 36. Dig. eod. or a pupil at the expiration of his pupillage, Dig. 28. 6. 15. L. 8. Cod. de impub. et aliis substitut. All that was necessary seemed to be, that the real will of the testator should sufficiently appear. But by virtue of this privilege, the soldier could not bequeath his *peculium adventitium*, and still less his *peculium profectilium*; nor could he enfranchise his slaves to the injury of his creditors, against the law Ælià Sentia. Dig. de milt. test. L. 15, 28, and 41.

This military privilege was confined by Justinian to the time of actual warfare in camp or in a besieged place. It did not take place in winter quarters, or in a garrison town. Lex penul. Cod. hoc tit. Testaments of this nature held good for a year after dismission, Dig. 29. 1. 21 and 26. The dismissals were, *missio causaria* on account of inability from infirmity: *missio honesta*, when the term of service was expired, *emeritus*. *Missio ignominiosa*, for some disreputable cause. They had also of course, the *missio temporaria*, *commeatus*, or furlow, but I find no provison made for this.

The *Testamentum in procinctu* was introduced by Julius Cæsar, and allowed for a limited time. Trajan made it perpetual. Cicero men-

tions the *testamentum in procinctu*, *De nat. De or.* II. 3 *De orat.* I. 53.

§ *In militum testamentis solennitates remissæ*, p. 118. *Quod nostra constitutio.* Cod. 6. 21. 17.

§ 1. *Rescriptum Divi Trajani.* p, 118. Trajanus Catilio. Dig. 29. 1. 24.

§ 2. *De surdo et muto*, p. 118. This means accidentally so; for persons *born* deaf or dumb could not at any time make a will. Ferriere.

This was a privilege peculiar to soldiers, till Justinian's time, who granted this privilege to all his subjects in general. Cod. 6. 22. 10. Harris.

§ 6. *De peculio quasi castrense* p. 120. *Cujus constitutionis.* Cod. 3. 28. 37. The Roman youth, *qui togatas et civiles militias exercebant* were entitled to a peculium, *quasi castrense*, but they could not formerly devise it, unless by imperial permission. Dig. 36. 1. 1. 6. Dig. 37. 13. 3. 5. Dig. 37. 6. 1. 15. this privilege was extended by Constantine. Cod. de castr. omn. palet. parul. by Leo, and by Anthemius, to sons of families engaged in ecclesiastical avocations, L. 34. Cod. de episcop. et cleric. and lastly by Justinian L. ult. Cod. qui test. fac. poss. L. 7. Cod. de assess. L. 4. Cod de advoc. divers. jur.

Tit. 12. *Quibus non est permissum*, p. 121. and § 1. *De impubere et furioso*, p. 123. As I have before observed, the making of a will, is in fact the making of a law to regulate after death the property acquired during life time. This is not a natural right, for no dead man can have any rights. The human race are by nature usufructuaries only. It is society alone, that creates and protects the right of making a will. This right by a law of the 12 tables was exclusively given to fathers of families. Cic. ad Herenn. L. 1. Under the term pater familias, for this purpose, were included women not in the power of any person. Dig. 50. 16. 1.

The privilege as before remarked was extended to the military and quasi-military property of persons in the army, and in certain public employments. In other cases, even the consent of the father was insufficient; for the right was grantable, not by private persons, but by the public will. Dig. 19. 6. 25-1. But the donations *mortis causa* were as much of the nature of contracts as legacies, and to these, the assent of the pater familias could give validity. Dig. 2. 14. 18. Dig. 44 7. 39. A will made on the last day of the 14th year was good *quia favore supremarum voluntatum, dies incœptus habetur pro completo.* Vestals also *impuberes*, might make a will. Hence probably the permission given to the christian vestals or nuns, and other females under

vows of celibacy, Aul. Gell. noct. atticæ. 1 ch. 12, Sozom. Hist. eccles. L. 1 c. 9. but Leo the philosopher repealed this permission, Nov. 26.

As to insane persons, see Dig. 27. 10. juncta glossa. L. 9. Cod. hoc. tit. Valer. Max. L. 7. ch. 8. Dig. 28. 3. 6. 5. et seq. our law is as here laid down. Swinburne 79. 7 Bac. ab. 301.

Non possunt impuberes.] The rules of the civil law take place in *England*, in regard both to the capacity and incapacity of minors to make wills, as far as those wills relate only to personal estate: so that, if a boy, not arrived at the age of *fourteen*, or a girl, not arrived at the age of *twelve*, makes a will of personal estate, it will not be good; although such boy or girl, was *doli capax* at the time of making the will, and capable of discerning right from wrong: neither will a testament, made by a male infant under *fourteen*, or a female under *twelve*, become good, without a republication, although such infant should afterwards arrive at the proper age. But it hath been allowed in the case of *Hide* and *Hide*, that a male infant of 14, and a female of 12, might make a will of personal estate; and it was said to have been so agreed by lord keeper *Wright*, in the case of *Sharpe* and *Sharpe*, in which the court followed the civil law of *Justinian*, which permits minors to consent to marriage at such their respective ages. *Gilbert's Repts. page 74.—Swinb. fol. 74.* But, in regard to a will of real estate, it was enacted in the reign of *Hen.* 8. "that wills or testaments made of any manors, lands, tenements, or other hereditaments, by any woman covert, or person "within the age of one and twenty years, idiot, or insane, shall not "be good or effectual in law." 34 *H.* 8. *cap.* 5. *sect.* 14.

And it hath been adjudged, that, if a minor under twenty-one makes his will, and devises his lands, and afterwards attains the full age of twenty-one years, but dies without making any new publication of his will, the will is void. 1 *Sid.* 162. *And.* 182. *Dyer.* 143. *Raym.* 84.

Furiosi autem. "Mad folks and lunatics, during the time of their "insanity, cannot make a testament, nor dispose of any thing by will, "not even to pious uses. The reason is, because they know not what "they do; for, in making a will, integrity and perfectness of mind, "and not health of body is required: and thereupon arose that com-"mon clause used in every testament; *sick in body, but of perfect* "*mind and memory.* It was therefore determined by the judges, in "*Combe's* case in the *Star-Chamber*, (*Moor* 759.) that sane memory "for making a will is not at all times, when the party can speak *yea* or "*no*, or hath life in him, nor when he can answer to any thing with "sense; but he ought to have judgment to discern, and to be of per-

" fect memory, otherwise the will is void. And so strong is this im-
" pediment of insanity, that, if the testator makes his testament after
" this furor hath overtaken him, and whilst it as yet possesses his
" mind, albeit the furor afterwards departs, and the testator recovers
" his former understanding, yet doth not the testament, made during
" his former fit, recover any force or strength thereby. Howbeit if
" these mad or lunatic persons have clear and calm intermissions, then
" during the time of such their freedom of mind, they may make their
" testaments; so that neither the *furor* going before, nor following
" the making of the testament, doth hinder the same begun and finish-
" ed in the mean time." *Swinburn of test. part* 2. *sect.* 3. *Cod.* 6. *t.* 22.
" *l.* 9. Harris.

See further on this subject, Swinburne on wills 74 et seq. and Co. Litt. 89. b. with Hargreave's note 6 therein, as to the dissonance of opinion at what time an infant may make a will. It seems now to be settled that this is 14 in males and 12 in females for personal estate. *Ex parte, Holyland*, 12 Vez. junr. 11. Judge Wilson's Bacon's ab. v. 7. p. 300.

The stat. 32 and 34 Hen. 8 on this subject are not adopted by the judges of the supreme court of Pennsylvania in their Report. See 3 Binney's Rep. append. But I apprehend the law of Pennsylvania nevertheless is, that a minor cannot make a will of lands; for such was the law at the time of our act of assembly concerning wills 1705, and no alteration has been since made in this respect. The wills therein spoken of, must be taken as meaning such wills as could then be legally made.

§ 2. *De prodigo*, p. 123. The law of England takes no notice of prodigals.

§ 4. *De cæco*, p. 124. Formerly the blind were permitted to make a will. Paul. L. 3 sentent. tit. 3 § 4. and the comments on Dig. 28. 1. 22. 6. which permits a will to be signed at night. But when the emperors Diocletian and Maximinian ordained that a testator should see and be seen by his witnesses, this permission was vi rtually repealed. 9. 12 Cod. de testament, Justinian regranted this privilege.

In England the testator and the witnesses to a written will, must be within sight of each other at the time of executing and witnessing the will; *Longford v. Eyre*, 1 P. Wms. 740. *Gryle v. Gryle*, 2 Atk. 176. *Casson v. Dade*, 1 Br. ch. ex. 99. but a blind man may make a nuncupative will, or may acknowledge a written will in presence of witnesses. Swinb. 96.

§ 5. *De eo qui est apud hostes*, p. 124. Although a captive could not make a will, his codicils might be rendered valid by a subsequent will after his return. Dig. 49. 15. 12. 5.

Tit. 13. *De exhæredatione liberorum*, p. 124. Under the civil law, the appointment of a heir, is an essential part of a will. If the son, under power of the father, be passed over and not named, the will is void. He must be simply and unconditionally disinherited. Dig. 28. 2. 3. 1. Dig. 28. 5. 4. Dig. 35. 1. 83. L. 4. Cod. de inst. et subst. L. 15. Cod. de condit. inst. nor could disinherison take place by codicil: § 2. *Inst. de Codic.* Nor though the unnamed son should die before his father, would this give validity to the instrument originally defective in its formation, Dig. 28. 2. 7. Dig. 28. 3. 12. 17. joining Ulpian, tit. 33. § 6. But the will would not be invalid by the preterition of daughters, or grand-children, Dig. 28. 3. 8. 1.; but they had their portion though omitted to be named. Thus, if heirs were instituted from among the children of the testator, the daughter and grand-children would have equal parts with each of the heirs: as if there were three heirs, each heir would have three ounces, and the omitted daughter or grand-son three ounces, the estate being divided into twelve. If the heirs were three strangers, they would have six ounces, and the omitted daughter or grand-son six. *Nam scriptis heredibus, accrescebant suis in virilem* (a man's share) *extraneis vero in semissem.* Justinian took away these distinctions, and nullified the will if any of the offspring of the testator, and in his power, were omitted. For the causes of disherison see Nov. 115. which also requires, that it shall be express and by name, and *cum elogio*, or stating some one of the 14 allowed causes, in all cases of legitimate children born.

In England, the law is not so. A testator may disinherit his own children, by express words, or by omission. But the practice of leaving a shilling to a child intended to be disinherited, seems to have originated in the above doctrine of the civil law. Swinburne, part 5. § 1. But *semble* that as a general doctrine, an heir cannot be disinherited by implication: yet in *Trent v. Hanning*, three judges, dissentiente Lawrence, went very near if not quite that length; 7 East. 106. see *Piggot v. Penrice*, Gilb. Eq. Rep. 138. *Johnson v. Haines*, 4 Dall. rep. 64. *Cresoe v. Laidley*, 2 Binney, 279. In England, the heir is a favourite upon feudal principles, and as connected with the institution of primogeniture, which does not operate in this country; but the general rule above laid down is in unison with the dictates of natural justice.

§ 1. *De posthumis*, p. 125. A posthumous child not named might have set the will aside: but it was not void if the offspring was born dead. Dig. 37. 6. ult. Posthumous children were so called when born after executing the will, as appears by the 1st Chap. of the Lex Vellea. Gaires 6. lib. 2. Inst. tit. de exhæred. lib. 2. § 2.

Children born after the death of the parent and within ten months were accounted his. As to the English law on this subject, see Hargreave's Co. Litt. 86 and 123. b. with the notes.

By the present French code, the subsequent birth of a legitimate child revokes a will.

Agnatione posthumi.] The rights of posthumous children seem to be regulated by the rights of those, who are born in the life-time of their parents. Thus the civil law permits the birth of a posthumous child to annul a testament; because it is by that law in the power of any child, who hath been either omitted in his father's testament, or disinherited nominally without cause, to set that testament aside; and where preterition is a sufficient reason to destroy a will, at the instance of a child born in the life-time of his father, it would be extremely hard not to allow this reason at least an equal force, in regard to a posthumous child. But by the law of *England* the birth of a posthumous child does not affect the testament of the father in any degree; which is in appearance a very rigid doctrine: but with us the testament of a parent can not be annulled on account of the preterition, or causeless disinherison of a child, born in his life-time; for the law permits every man to dispose of his own fortune, as he pleases: and therefore, if a posthumous child was allowed to annul a will, it must follow, that such child would have a greater right, than if he had been born in his father's life-time; namely, the right of annulling his father's will on account of preterition. And, if the law was to pursue a middle way, and admit a posthumous child to take a share of the deceased's estate without annulling the whole testament, this would be in effect to make a new will for the deceased, and to remedy a less evil by the introduction of a greater, in countenancing a practice so very dangerous, and contrary to that established rule of law, which gives every man an uncontrouled power in the disposition of his own fortune. What has been here said is intended only in regard to wills of personal estate; for, in respect to the wills of real estate, there are, besides the statute of frauds, many other reasons, which might be urged to evince, that the birth of a posthumous child can not be allowed to operate as a revocation. Harris.

The English law seems now settled that marriage alone does not, but that marriage and birth of a child, even a posthumous child, does amount to a revocation of a prior will. The reader will find all the older cases cited in some or other of the following more modern ones, which may slightly assist those who may have occasion to trace the history of this question in England. The civil law doctrine is discussed in Lord Kenyon's, argument in *Lancashire v. Lancashire*, 5 Term rep. 59. His Lordship highly approves of the rejection of the civil law regulations respecting the *Testamentum inofficiosum*, wherein I confess I can hardly coincide; but in conformity to prior decisions, he adopts their rule of revocation on marriage and the birth even of a posthumous child.

Forse v. Hembling, 4 Co. rep. 60.
Overbury v. Overbury, 2 Show. 242.
See the cases referred to in the note of *Mr. Leach*, on this case.
Brown v. Thompson, 1 Eq. Ca. ab. 413.
Ib. cited by Swinburn, 535.
Cooke v. Oakley, otherwise *Eyre v. Eyre* } 1 P. Wms. 304.
Christopher v. Christopher, 4 Burr. 2182. n.
Wellington v. Wellington, 4 Burr. 2171.
Brady v. Cubit, Doug. 80.
Shepherd v. Shepherd, Doug. 37. n.
Same 5 T. Rep. 58.
Lancashire v. Lancashire, 5 T. Rep. 58.
this seems the latest and leading case, in which the authorities are fully discussed.

The decisions proceed on the principle, that as wills are ambulatory till the death of the testator, *Lord Beauclerk v. Dr. Mead*, 2 At. 167. any intermediate act, or any change of circumstances inconsistent with the will, amounts to an implied revocation. Gilbert on devises 93. *Christopher v. Christopher*, 2 Dickens, Ch. Rep. 447. But an implied revocation may be rebutted by evidence of circumstances that imply otherwise: and where the subsequent change of situation of the testator, is not inconsistent with the provisions of the will, there may be a revocation in part only. *Kennebel v. Scrafton*, 2 East, 530. 5 Vez. 863, *Expte Ilchester*, 7 Vez. 348. Whether the birth of more children after the execution of the will, and the testator's second marriage after that, amount to a revocation, see *Gibbons v. Caunt*, 4 Vez. 840.

The law of Pennsylvania has as I think been very judiciously altered by the acts of 23 March 1764 and 19 Ap. 1794; which enact that a

testator having made his will, and afterwards married, and then dying and leaving a widow, or a child born subsequent to the will, it shall amount to a revocation as to them; and they shall be in the same situation as if he had made no will. On these acts the following decision has taken place.

In *Coates v. Hughes*, 3 Binney, 498, it was determined that a subsequent marriage and birth of a posthumous child do not amount by the law of Pennsylvania to a total revocation of a will even where the subsequent issue is the testator's only child. They amount to a revocation pro tanto, namely, so far as regards the widow and the child, but not as to the appointment of executors, nor as to a power to sell for the payment of debts. The reader will find most of the learning of the books collected briefly in this case; which turned upon the expressions of the acts of assembly on this subject.

In 1 Washington's Virg. rep. 140. *Wilcox v. Rootes, et al.* it is taken for granted by the court, that a subsequent marriage and birth of a child is an implied revocation of a former will. This was in 1792; but in 1802, came on the case of *Yerby v. Yerby*, 3 Call's Virg. rep. which was this:

A man married and had six children: he made a will in 1785. His wife dying, he married again in 1790, and had two children, to wit, the present plaintiffs, by his second wife.

It appeared in evidence, that previous to his second marriage he had promised that the children he might have by his last wife, should be as well provided for, as those he had by his first wife. It appeared further in evidence, that during his last illness, it was proposed to him to alter his will and provide for the present plaintiffs: but he refused, saying he wished some alterations to be made, and when he got well he would have them made. He appeared much distressed, and wished to evade the conversation.

This case was argued against an implied revocation on the following grounds.

1stly, The Virginia act of assembly provides only for *posthumous* children pretermitted: the court cannot go farther: they cannot by extension make a new law.

2dly, This is not the case of a testamentary disposition in favour of strangers, which is required to be revoked, but of children, who had at least as strong a claim as the plaintiffs.

3dly, Implied revocations may be rebutted, by expressions in the will, or by circumstances, 1 lord Ray. 441. Doug. 31. and a reference to a will as a subsisting one, rebuts the presumption of revocation

Doug. 31. An expression of an intention to revoke a will hereafter, does not operate as a revocation. Pow. Dev. 534, much less an expression of a mere intention to alter it. The court unanimously confirmed the will; and I think the law was with them; but is it possible to read such a case as this, without regretting the want of the civil law principle *de inofficioso testamento?* The unfeeling exclusions, imperiously demanded by the institution of primogeniture, are sufficiently odious, but they fall far short of such a case as this, under the republican laws of Virginia.

By an act of Massachusetts, 1700, and Feb. 6. 1784, a child not mentioned in the will of his parent, shall be entitled to such distributive share as he would have had by law, had the parent died intestate: but in *Terry v. Foster*, Mass. Rep. 146, and in *Church v. Crocker*, 8 Mass. Rep. 17. the court held it sufficient to bar the claim of a child to a distributive share, if noticed by name in the will, though a small legacy or even no legacy, were bequeathed to such child.

The other points apppertaining to the law of revocations, are not sufficiently connected with the subject of this section to be dwelt on.

§ 2. *De quasi posthumis*, p. 126. If a grandfather passed over his grandson being his proper heir at the time of making the testament, it might be done designedly to exclude him from the possession, and the will might nevertheless be valid. But if the grandson was not the proper heir at the time, the father being alive, the grandfather was not presumed to have passed him by, with intent of disinherison, but that the father would regularly succeed in the first place. In this case therefore the will might be broken. Dig. 28. 3. 15. Cujas comment. ad Dig. 28. 2. Now by Nov. 115 and l. 3. Cod. de post. hæred. inst. the passing over any children of the testator is fatal to the will, except only that posthumous children not named must be born alive for that purpose. See on the subject of this section l. 3 Cod. de post. hæred. inst. Dig. 37. 4. 8. 4. As to the law Velleia, see Dig. 28. 2. 29.

§ 4. *De adoptivis*, p. 127. We have no adopted children in the Roman sense of the word.

Quæ de naturalibus, &c. Natural children, in the phraseology of the English and American law, are children born out of wedlock, and are contra-distinguished from legitimate children: but in the language of the civil law, natural are contra-distinguished from adoptive children; that is, they are the children of, the parents spoken of. by natural procreation.

§ 5. *Jus novum*, p. 128. *Nostra vero constitutio.* Cod. 6. 28. 4.

In nostra constitutione. Cod. 8. 48, 10.

Tit. XIV. De heredibus instituendis, p. 130. Formerly all legacies and provisions in a will that preceded the nomination of the heir were void, so necessary was such an appointment to the validity of the will itself. Ulp. tit. 24. § 14 and tit. 25. § 6. Juncto Paulo l. 2. sentent. 6. § 1. But by l. 15 and 24. Cod. de test. this precision was rendered unnecessary, and if by apt and intelligible words, a heir was named in any part of the will, it sufficed. It was necessary that the will should comprehend the whole of the testator's property, for he could not die intestate for one part, and testate as to another. If the heir was nominated of the first degree, he was *instituted*, if one more remote, he was *substituted.*

Qui possunt hæredes institui, p. 130. *Ex nostra constitutione.* Cod. 6. 27. 5.

§ 2. *De servo hæreditatio*, p. 132. For this translation of the *testamenti factio*, see Inst. Lib. 1. Tit. 19. § 4. *Hereditariis servis testamenti factio est:* that is, not *factio activa*, the right of making a will, but *factio passiva*, the right of taking by will.

§ 4. *De numero hæredum*, p. 132. *Usque in infinitum*, means as many as he pleases within reasonable bounds. For instance, all the inhabitants of China, would be plainly absurd. He may appoint a corporation or community if he pleases. l. hereditas, Cod. h. tit.

§ 5. *De divisione hæreditatis*, p. 132. *Hæres ex asse*, a whole and sole heir. *As*, among the Romans was an unit.

Ex parte testatus, et ex parte intestatus. In England, this is otherwise. If a testator disposes of only half his estate, he will be deemed intestate as to the rest, which will go according to the statute of distributions.

§ 8. *Si plures unciæ quam duodecim*, &c. p. 134. Suppose THREE heirs: to the first is left *four* ounces; to the second *three* ounces; to the third, *two* ounces. Then *three* ounces will remain undisposed of. These are to be divided into *nine* parts; of which the first heir will be entitled to *four*, the second to *three*, the third to *two.*

Again suppose THREE heirs: to the first is left *eight* ounces, to the second *six* ounces, to the third *four* ounces, in all *eighteen* ounces. Each heir must suffer a deduction in proportion to his share. Thus: if 18—12—8? Answer, $5\frac{1}{3}$. If 18—12—6? Answer, 4. If 18—12—4? Answer, $2\frac{2}{3}$ That is, the first devisee will be entitled to $5\frac{1}{3}$ ounces, the second, to 4 ounces, and the third to $2\frac{2}{3}$ ounces, or twelfth parts of the estate devised.

If *nine* ounces be left specifically indifferent proportions among three

heirs, and *three* ounces are left generally to three others, the last will share in equal portions.

Suppose a testator to institute six heirs, bequeathing to three of them portions amounting to a whole AS : *six* ounces for instance to one, *four* to another, and *two* to a third, and the other three are named heirs simply without any specific assignment of portion. In this case, the estate will be divided into two *asses*, of which the three specific devisees will take one in their respective proportions, and the three others another *as* in equal proportions.

But if the first three had specifically assigned to them *eighteen* ounces, then the DUPONDIUM or double AS would again take place; and the estate being divided into *two asses* or 24 ounces, the three heirs nominated simply, without assignment of shares, would divide between them in equal portions *six asses*. Ferriere in loco.

§ 9. *De modis instituendi*, p. 135. None but a military man could by the Roman law, be partly testate, and partly intestate. Dig. 50. 17. 7 and 29. 1. 41. But where the condition annexed is in itself incertain, the event must be waited for; and if the condition should not take place the will is void. If it do take place, then the heir is considered as in from the death of the testator, *quia dies incertus retrotrahitur ad initium*. Dig. 28. 6. 33.

In England, an executor, who may be considered as *quasi hæres*, may be appointed from a certain time, or until a certain time, and the next of kin may be appointed administrator as to the vacant time. Swinburn, 310.

§ 10. *De conditione impossibili*, p. 135. Impossible conditions are regarded as not seriously meant by the parties. Dig. 44. 7. 31. Possible conditions may be casual, or potestative, or mixt. Thus, I appoint Titius my heir, if my ship arrives from Asia. This is a casual condition. With this condition, a stranger may, but a proper or domestic heir, cannot be appointed heir. Dig. 28. 5. 4 and 86. 1. 4. Cod. inst. et subs. A mixt condition is partly casual, and partly potestative, as provided he shall go to the capitol, so soon as Mævius becomes Consul. Mævius never may become Consul. In this case, a stranger may, but a proper heir cannot be instituted. If an heir be appointed, provided that immediately after my decease, he shall go up to the capitol, this is potestative and valid, because the nominee may at his own pleasure put an end to the condition.

Impossibilis conditio.] "Although impossible conditions, whether "they are so by nature or by law, do not hinder the effect of the dis- "position, being reputed as if they were not written or uttered; yet,

" if a testator supposes a condition to be possible, which is in reality " impossible or illegal, then such condition is not void, but will render " the disposition void, to which it is added: as for instance; if the " testator makes *Titius* his executor, or gives him an hundred pounds, " if he marries his, the testator's daughter; supposing her to be liv- " ing, when she is dead: in this case, the condition is impossible; and " yet *Titius* can not become executor, or obtain the legacy; because it " is not probable, that the testator would have made him executor, or " given him an hundred pounds, if he had known, or believed, his " daughter to have been dead." *Swinb. part* 4. *sect.* 6.

§ 11. *De pluribus conditionibus*, p. 135. see Dig. 35. 1. 6. as to joint conditions.

In alternativis, sufficit alterum adimpleri.

Tit. XV. § 1. *De numero hæredum*, p. 136. Thus: let *Primus* and *Secundus* be my heirs. If default should take place in case of *Primus*, let *Tertius* be my heir in his room. Or if *Primus* and *Secundus* refuse, let *Tertius*, or *Tertius* and *Quartus*, become my heirs.

Plures in unius locum.] This kind of substitution, which is called ordinary or vulgar, is of no small use in *England*, and we do therein, for the most part, follow the precepts and rules of the civil law: for it is nothing else but the adding a condition, which we commonly call *tail* in the case of lands; namely, a limitation of heirs, to whom a testator intends, that his lands should descend. *Strahan* on *Domat.* vol. 2. p. 221. *Cowel's* inst. tit. 15. Harris.

Substitutions are rejected by the code Napoleon. Art. 896.

§ 2. *Quam partem singuli, &c.* p. 136. Suppose *Primus*, *Secundus*, and *Tertius*, are heirs and reciprocally substituted each for the other: *Primus*, having assigned to him *one* ounce, *Secundus eight* ounces, and *Tertius three* ounces. If *Primus* resigns, his ounce must be divided into eleven parts, of which *Secundus* takes *eight*, and *Tertius three* parts. Ferriere.

Ita Divus Pius. Ccd. 6. 26. 1. Dig. 28. 6. 24.

§ 3. *Si cohæredi substituto*, p. 137. If *Primus* and *Secundus*, are appointed heirs, and *Secundus* substituted to *Primus*, and *Tertius* to *Secundus*, then if *Primus*, and *Secundus*, both die, *Tertius* is considered as entitled to the heirship of *Primus*, as well as of *Secundus*, and the share of *Primus*, does not escheat to the treasury.

If *Secundus* should die, and *Tertius* succeed to him, and then *Primus* should die, a question arose whether the treasury or *Tertius*, should succeed to the share of *Primus*. It should seem at first that the decision was in favour of the treasury from Dig. 28. 6. 27, But

it appears that *Severus* and *Antoninus*, leaned against the claim of the treasury. *Mysinger.* h. l. Whether the same doctrine takes place in pupillary substitution, see Cujas on Dig. 28. 6. 41. and Ferriere in loco.

§ 4. *Si quis servo, qui liber existimabatur*, &c. p. 137. In this case, the heirship was divided, from the total incertainty of what the testator might have willed had he not been mistaken. *In dubiis enim causis, ad judicium rusticum esse recurrendum, ipsa ratio suadet; et in ambiguis, quod minimum est, sequimur.* Neither is this opposed to Cod. de heredib. instit. l. 3, where it is said to be a question of inclination: for this question can only arise where there is room for rational conjecture.

Cujas corrects Dig. 28. 5. 40. from *ita ut alter semis*, to *ita ut As*: and as Ferriere supposes, rightly; scribes frequently making mistakes by their abbreviated characters, *Siglæ.*

Tit. XIV. De pupillari substitutione, p. 138. This could not be exercised by the parent over a son emancipated, whether at the execution of the will, or the death of the testator. Dig. 28. 6. 2 and 41. Nor could the mother exercise this right over her son, being as yet *impuber.* Nor is this contrary to Dig. 28. 6. 33. because this last is a mere case, not of pupillary, but of common substitution, for the heritage does not attach till the son arrives at fourteen years of age. This is the *tabula pupillaris*, of the jurisconsults, and an heir may be appointed for a future time. Sup. inst. heredib. inst. tit. 14. § 9. But then such an appointment by that section of the institutes, is directed to take place immediately, notwithstanding the limitation. Or if it be considered as incertain whether the *impuber* will arrive at puberty, then the condition being incertain, the validity or nullity of the will depends upon that event. *Dies vero incertus vim habet conditionis et perinde ad initium potest retrahi.* Cod. de hered. inst. l. 9. and this seems to be the true light.

§ 1. *De substitutione mente capti*, p. 138. *Infirmari sancimus*, Cod. 6. 26. 9. Dig. 28. 6. 43.

§ 2. *Proprium pupillaris substitutionis*, p. 139. *Quodam modo duo testamenta. Duplices Tabulæ*, as they are called, Dig. 35. 2. 70. Dig. 18. 4. 2. § illud. The father might make a substitution to his son being *impuber*, after having made his own will, and before other witnesses, Dig. 28. 6. 16. but a mother could not. Sup. Still, these being in fact the will of one person, viz. the father, they were regarded conjointly as one will, Ib. l. 2. § 4. and l. 20. and Dig. 42. 5. 28. Where a father

substitutes to a disinherited son, he must make his own will first, and so, must be understood, Dig. 28. 6. 2. 2. Ferriere.

If a child, not arrived at puberty, do not fall within some one of the causes of disinherison stated in Nov. 115, he may effectually prefer the allegation of invalidity from neglect of natural duty; *(inofficiosi testamenti)* against the will. These causes are briefly as follows: all comprehended under the general denomination of ingratitude; so that it seems a commentary upon the old adage, *ingratum quem dixeris omnia dicis.*

1stly, If the child hath assaulted the parents: or 2dly, inflicted upon them a great and dishonorable injury: or 3dly, accused them of crime, except where the emperor or state was concerned: or 4thly, practised sorcery: or 5thly, attempted the life of either of his parents by poison, or any other secret means, or 6thly, debauched his stepmother, or his father's concubine: or 7thly, turned informer against his parents, and thus put them to expence: or 8thly, if he do not attempt to relieve his parent out of prison, by offering so far as he can, to become security: or 9thly, if he should unfairly prevent his parents from making a will: or 10thly, if he has joined a company of gladiators, *(arenarii)* or stage players, *(mimi,)* or 11thly, if a daughter should refuse to marry a husband provided by the parent, who is also willing to bestow on her a reasonable portion, but chuses to live a libertine single life. However, if the parent hath not taken care to provide her a proper husband before the age of 25, and she should then have a child, it is the fault of their neglect, and no cause of disinherison: or 12thly, if the child should neglect to succour and take care of a parent, who may become lunatic or insane: or 13thly, should neglect to exert himself honestly to redeem his parent from captivity: or 14thly, if being brought up by his parents, in the orthodox doctrine of the church, he should swerve from the catholic faith. This last to be sure, might be converted into a fruitful source of complaint.

§ 5. *Pupillare testamentum sequela paterni*, p. 140. Pupillary substitution is founded on the will of the father: so that if this be set aside, the pupillary substitution falls with it. Dig. 28. 6. Dig. 50. 17. 129. 1. and l. 17. 6. ib. So the pupillary substitution holds good in the same manner as the will holds good. Dig. 29. 2. 4. 1.

§ 6. *Quot liberis substituitur*, p. 140. In this case, the substitute cannot succeed till the death of the last child under age.

Ferriere puts this case: A father making his will appoints *Primus Secundus* and *Tertius* Patres familias, *Quartus* an impuber, and *Quintus* a slave, his heirs, with assignment of various portions. He dies.

herits his son not of age, and appoints as substitutes in case of his son's death before puberty, such of the five persons as may become heirs to himself. *Primus* declines: *Secundus* and *Tertius* accept: so does *Quartus* at command of his father; so does *Quintus* at command of his master. *Secundus* dies: *Quartus* becomes filius familias and is emancipated: *Quintus* is manumitted. Who shall be the substitute? shall *Primus*? shall the heir of *Secundus*? shall the father of *Quartus*? or the master of *Quintus*? It is answered, that the substitution applied to the persons of the substitutes, not to their representatives: to those who had actually been the heirs of the father, as well as the instituted heirs: and therefore the substitution fell to *Tertius*, *Quartus*, and *Quintus* in the respective proportions of their original shares under the will of the father.

§ 7. *De substitutione nominatim aut in genere*, p. 141. See on this section the paraphrase of Theophilus, which is of great authority. "Moreover I may substitute to a minor within puberty, by name, and "say, if my son should be my heir and die within puberty, let Titius "be my heir. And I may substitute to him generally, as when I in- "stitute many persons as heirs together with my son, or by instituting "many heirs, I disinherit my son. I may so substitute generally, by "saying, whoever shall be heir to me the father, I substitute him to my "son if he should die before puberty. By which form of words "those who are the written heirs and remain so at the time, will by sub- "stitution become heirs also to the son dying within puberty. For "if the persons instituted reject the heirship as to the greater part, "they will take nothing by the pupillary substitution: for the pupillary "heirship will be divided between them, in the proportion of the ori- "ginal heirship, that is according to the portion they were respectively "entitled to under the father's institution of them as heirs to him."

I have already mentioned (Tit. 15, § 1) that substitutions are abolished in France by the Napoleon code.

"So detrimental has an unqualified and unlimited power of settlement "been found, even in France, that it has been made a question there, "whether it would not be for the advantage of the nation at large, "that all settlements and trusts should be abrogated. This question "so far as it related to moveables, was by the order of Louis 15, proposed "in the year 1744 by the chancellor D'Aguesseau to all the parlia- "ments and superior councils of France. See *Questions concernan. les "substitutions, avec les Responses de touts les Parliamens, et cours sou- "verains du Royaume, et les observations de M. Le Chancelier D'Agues- "seau sur les dits responses.* Toulouse, 1770. And see also *Commentaire*

" *de l'Ordonance de Louis* 15. *sur les substitutions per M. Feugole.* Paris, 1767. Butler's elaborate note on the doctrine of uses, Co. Litt. 272. a. sub finem, 279, a. See Code civil Nap. ou Recueil. Tom. 2. p. 429.

Tit. XVII. § 1. *Quando testamentum dicatur rumpi*, p. 142. *Secundum nostram constitutionem*, Cod. 8. 48. 10.

Not only in the cases mentioned in the text, but by the birth of a child subsequent to the will. Formerly the adoption of a son set aside the will, Dig. 28. 3. 7. if he was not instituted heir therein. Dig. 28. 3. 18. Dig. 28. 3. 23. 1. Dig. 37. 4. 8. 7. but by this law of Justinian, an adopted son, does not invalidate the will, unless he be a *pater familias*, or if being a *filius familias* he be adopted by some relation paternal or maternal in the ascending line. Cod. de adopt. lex penult.

As to the general doctrine of revocations, see Viners's Ab. under this head, and the note 4 of Serjeant Williams to page 276 of Saunder's Reports, and the cases there referred to, particularly *Brydges v. the Dutchess of Chandos*, 2 Vez. jun. 417. and *Goodtitle v. Otway*, 7 Term Rep. 399. The following cases on the subject have occurred since that note.

Cave v. Holford, 3 Vez. 650. Revocation by susequent conveyance.

Lord Temple v. Dutchess of Chandos. Ib. 685. By a mortgage, or a conveyance in fee of a devised estate for the payment of debts, the will is revoked pro tanto only.

Hinckley v. Simmons, 4 Vez. 160. Mutual wills by two unmarried sisters under 21, the marriage of one, does not revoke the will of the other.

Crosbie v. Macdonald, 4 Vez. 610. All codicils are part of the will: therefore a codicil for a particular purpose only, does not revive a part of the will revoked by a former codicil.

Ib. Two inconsistent wills: a codicil referring to the first by date as the last will, revokes the intermediate will.

Gibbons v. Caunt, 4 Vez. 840. Quere, whether by the birth of more children subsequent to the will, and the testator's second marriage after the birth of those children, but no issue by that marriage, the will is revoked?

Lord Carrington v. Payne, 5 Vez. 404. A codicil applying to a particular part of the will only, was considered as a substitution for, and not a revocation of that particular part.

Knollys v. Alcock, Ib. 654. A contract for sale revokes a devise of the land But it is not revoked by a mortgage in fee to the devisee. *Baxter v. Dyer*, Ib. 656.

Kennebel v. Scrafton, Ib. 663. Marriage and birth of a child *(ut semble)* does not revoke a will made in contemplation of such marriage and issue by it.

Harmood v. Oglander, 6 Vez. 199. Devise revoked by a conveyance in trust, operating beyond the mere purpose of securing a mortgage.

At *law*, the courts only consider the great question whether the interest remains the same in the devisor, as it did at the date of the will; if not, whether the charge be for a general or a partial purpose, it is a legal revocation of the devise; but at *equity*, if the deed be only for a partial purpose, introducing only a particular charge or incumbrance, and not otherwise affecting the interest of the devisor; there, the use that would enure to the testator and his heirs, if alive, after that partial purpose was effected, will be held by equity to enure to the devisee if the testator be dead. Hence, a devise is not revoked by a mortgage in fee, or by a conveyance in fee for the payment of debts. Ib. A court of law, looks at the deed only, and compares the interest at the date of the will, with the alteration made in it by the deed: but equity looks also at articles, at covenants, and at the real intent of the transaction connected with the deed.

Equity controuls the law in cases of revocation under the two following circumstances only. 1st. Where the beneficial interest is devised, distinct from the legal estate, and the testator afterwards takes the legal estate without any modification or alteration. 2dly, Where having the legal as well as the beneficial estate at the date of the will, he divests himself of the former, but retains the latter: as in the case of a mortgage, or conveyance for the payment of debts. Ib.

Ellison v. Ellison, Ib. p. 656. Ellison in 1791 conveyed leasehold estate in trust to Wren: in 1786 he made his will, devising his personal estate, &c. In 1797 he took a conveyance to himself from Wren of the trust estate. Held this was no revocation; especially as no intent to revoke appeared in the proceedings.

Ex pte. Ilchester, 7 Vez. 370. *Montague v. Jefferys*, Moore 4. An act inconsistent with the will, though by accident not carried into effect, is a revocation: as a covenant with letter of attorney to make livery, though no livery made. Inchoate acts inconsistent with the will, amount to revocation if accompanied with power to destroy the provisions of the will. See further in lord Alvanly's argument as to the effect of parol and inchoate revocations previous to and under the statute of frauds.

Where the instrument inconsistent with the will is complete in itself to show the intention, it is a revocation, though something further re-

mains to be done to give it legal effect in favour of the person to whom it is made, as a bargain and sale without enrollment: a feoffment without livery, &c. but a second will unattested, is incomplete, and therefore cannot revoke.

Agreeable to the rule of the civil law, *tunc prius testamentum rumpitur cum posterius perfectum est*, which in *Limbery v. Mason*, Comyn. rep. 451, is laid down as the English law. Dig. 28. 3. 2.

Knellys v. Alcock, 7 Vez. 564. and *Attorney General v. Vigor*, 8 Vez. 281. *Maundrel v. Maundrel*, 10 Vez. 256. Mere partition, whether by compulsion or agreement is not a revocation: but the slightest addition, as a power of appointment to the limitation of uses is sufficient. In what case an instrument abandoned, ceases to be a revocation.

A codicil reciting a specific and limited purpose will revoke the whole devise, declaring the trusts again with the proposed alterations, and will confirm the will in all particulars not revoked. The omission of a trust though against the intention of the testator cannot be supplied. *Holder v. Holder*, 8 Vez. 97.

Harmood v. Oglander, 8 Vez. 126. There is no instance of a revocation at law, not being a revocation in equity, where the partial particular purpose was not for charges, or incumbrances, or to pay debts.

Rose v. Cuninghame, 11 Vez. 554. Where an agreement for the purchase of an estate has been executed, the purchaser may devise it, and the subsequent conveyance of the mere legal estate, will not be a revocation of the will, while the equitable estate remains. *Doe v. Pott*, Doug. 684. *Watts v. Fullerton*, Doug. 891.

Pemberton v. Pemberton, 13 Vez. 297. Duplicates of a will. The presumption is, that cancelling one of the duplicates amounts to cancelling the other, though both are in the testator's possession, and the cancelled instrument had been altered.

Charman v. Charman, 14 Vez. 580. Devise of real estate not revoked by bankruptcy.

5 Term Rep. 124. *Shove v. Princk.* An imperfect and inefficient deed, evidencing an intention to revoke, revokes a will.

1 Bos. and Pull. 576. *Goodtitle v. Otway.* No man has a right to devise an estate of which the title is not in him at the time of the devise; it must be *his own*: legally, according to the doctrines of the courts of law; equitably at least, if not legally, according to the doctrines of the courts of equity: no subsequent acquisition of the title, will make that will good, which was bad when it was executed. This appears from *Baker and Baker's* case, 3 Co. Rep. 30. b. *Sparrow v. Hardcastle*, 3 At. 803. per Lord Trevor in Fitzg. 240.

Hence in *Swift ex dem. Neale and Roberts*, Burr. 1497, Lord Mansfield denied that a joint tenant could devise his estate, either by law or by statute. For by the express words of the statute of 34 and 35 Hen. 8, a devisor must *have* the estate he pretends to devise: and an after purchased estate will not pass. A will under the Roman law, essentially consisted in the appointment of an heir: in England it is ambulatory, and revocable, and more in the nature of a *donatio mortis causa*.

And this estate must continue in the devisor till the time of his death: for if, by any form of conveyance, he passes away *the whole estate*, although he takes it back again instantaneously by another conveyance, and whether this be done *animo revocandi* or not, the retaking is a new estate; it is not the same estate, and the former will without republication, does not pass it; for a will can not operate upon an estate which a man has wholly conveyed away. Lord Mansfield, in *Roe ex dem. Noden v. Griffith*, 4 Burr. 1960, laments this; but the law was so settled in *Lord Lincoln v. Rolls*, Show. Parl. Cases 154 and 1 Ab. Ca. in Eq. 411. to the same purpose, are, *Sparrow v. Hardcastle*, sup. and *Parsons v. Freeman*, 3 At. 740. and the other decisions cited by Buller, and by Eyre, in the present case of *Goodtitle v. Otway*, which is very instructive. Eyre however, like Lord Mansfield, seems to me to regret that this rule of positive law, was ever carried further, than that a disposition of the whole estate, amounted to evidence of an intention to revoke, which might of course be rebutted. But so the law is. This law is no otherwise modified by equity, (which doubtless cannot supercede the statute) than by protecting those equitable interests, which a man reserves by articles and covenants that a court of law cannot investigate; and by declaring that when the legal conveyance is only a mere matter of form with a view of charging or incumbring the estate for the purpose of paying debts or otherwise, it cannot be considered as exhausting the fee—as amounting to a conveyance of the WHOLE estate.

* 3 Bos. and Pull. *Larkins v. Larkins*, a devise to two as joint tenants. Devisor afterwards strikes out the name of one. This is only a revocation pro tanto.

As to the decisions in Pennsylvania.

A second will containing an express clause of revocation, revokes the first. 2 Dall. Rep. 268, *Boudinot v. Bradford*.

Where a second will is destroyed *without more*, the preceding will not having been cancelled, generally speaking is ipso facto revived. Ib.

and evidence will be admitted to show whether the testator cancelled the second with an intent to revive the first will, or to die intestate. Ib.

The mere act of making a second will, is a revocation of the former, as to the personal estate, the law throwing that on the executor as trustee. Ib.

A will revoked by a subsequent will, but not cancelled, is re-established by cancelling the second will. 2 Dall. rep. 289. *Lawson v. Morrison.*

A will in writing revoking a will in writing, must be attended with all the solemnities necessary to the first will. Presumptive and implied revocations from change of state, or acts inconsistent with the will, may be rebutted by counter evidence. Ib.

A will in writing may be revoked by the parol republication of a former will in writing. And if the republished will cannot be found, its contents may be proved. 2 Binney, 406, *Havard v. Davis.*

A subsequent marriage and birth of a child, under the acts of Pennsylvania, operate as a revocation pro tanto only. 3 Binney, 498, *Coates v. Hughes.*

I have found nothing as to the revocation of wills in the New-York decisions, nor in the Southern cases, other than I have already referred to.

§ 2. *De posteriore testamento*, p. 142. By Dig. 28. 3. and Cod. de testam. 27, it is said to be sufficient if the revocation be made before three witnesses, 10 years after the first will.

Theodosius and Valentinian, declared a will revoked, at the end of ten years from its execution, although the testator should have shewn no change of disposition. Cod. Theod. de testam. 6. But Justinian required a formal revocation as above, in presence of three witnesses.

§ 3. *De posteriore in quo hæres certæ rei*, &c. p. 143. see Dig. 28. 3. 12. 1. *see Havard v. Davis*, 2 Binn. 406.

In ea constitutione. Dig. 36. 1. 29.

Ex lege Falcidia. vid. Title 22 of this book of the institutes.

§ 4. *De testamento irrito*, p. 143. Even the lowest diminution as if a pater familias became adopted, his former will was annulled. For his rights are thus merged in his situation as adopted son, and belong to his adopted father. Dig. 28. 3. 6. cum seq. Dig. 29. 7. 9. 3. But this would not be the case with a military will. Dig. 4. 5. l. ult. nor with a testamentary disposition of the *peculium castrense* of a son before emancipation. Dig. 28. 3. l. ult.

§ 6. *Quibus modis convalescit*, p. 144. *Per omnia:* that is, not throughout, but, not always, or not in all cases. Thus a will made in-

effectual, (*irritum*) by captivity, may be restored on return by the *jus postliminii*, or by the fiction of the *lex cornelia*, by which his death is considered as having happened at the moment preceding captivity. So the diminution by deportation, may admit of compleat reinstatement by the imperial decree. Dig. 28. 3. 6. 12. So in the smaller diminution by adoption of a pater familias, his will made as pater familias, might be re-established before the prætor, provided, 1st, It was in writing: for the prætor took no cognizance of nuncupative wills. 2ly, That the pater familias, becoming by adoption filius familias, regained his quality of pater familias and died in that state. 3ly, That he declared his desire, that his former testament should stand good, by codicil to that purpose. Dig. 37. 10. 1. 2 and 3.

§ 7. *De nuda voluntate*, p. 145. *Pertinacis Oratione.* I have already observed, that the emperors sometimes in person, and sometimes by their quæstors, addressed orations to the senate, proposing the laws they wished to be adopted. Dig. 23. 2. 16. Vinn.

The law of England is the same with that here laid down, viz. that if a testamentary paper is begun, but left unfinished, and the party lives a sufficient time to have finished it if he chose, the law presumes either that he did not chuse to finish it, or had not made up his mind concerning it. *Cranvell v. Sanders*, Cro. Ja. 497. *Burton et al. v. Gowell*, Cro. El. 306. Powel on Dev. 534. *Matthews v. Warner*, 4. Vez. 197. *Griffin v. Griffin*, Ib. in not. *Thomas ex dem. Jones v. Evans*, 2 East. 488. See also *Cogbill v. Cogbill*, 2 H. and Mun. 467.

§ 8. *Si principis litis causa, vel in testamento imperfecto, &c.* p. 145. Dig. 1. 3. 31. Cod. de testam. l. 3. Cod. de legib. l. 4. *Digna vox est majestate regnantis, legibus alligatum se principem profiteri. Adeo de auctoritate juris nostra pendet auctoritas.* *Et revera majus imperio est submittere legibus principatum. Et oraculo presentis edicti, quod nobis licere non patimur, aliis indicamus.*

Domitian declared, the emperor might accept the heirship of one of his subjects, if any one witness should prove that the deceased had made him his heir: but according to Suetonius, he was obliged to repeal this decree.

Tit. XVIII. De inofficioso testamento, p. 146. The allegation of invalidity as being contrary to the duties of his station in life, lay against the testament of a testator, who unnaturally disinherited his natural heir without sufficient cause. This allegation, was not properly speaking an action, nor a suit to recover the heirship, for the will is set aside. The process was, by notice to the instituted heir by the legitimate heir, and the cause was usually carried from the magistrate or

court below to the Centumvirs. Dig. 5. 2. 13. 17. The suit turned upon proof of some one or other of the fourteen causes or reasons of disinherison included in the 115th Novel; the *onus probandi* being thrown upon the instituted heir. Hence, it was in the nature of our motion for a rule to show cause. I have already abridged the fourteen causes of disinherison in that novel, but they are also briefly comprized in the following verses.

Bis septem ex causis exhæres filius esto:
Si patrem ferit; vel maledicat ei:
Carcere detrusum, si negligat, aut furiosum:
Criminis accuset, vel paret insidias:
Si dederit damnum grave; si nec ab hoste redemit:
Testarive vetet; se societve malis.
Si mimos sequitur; vitietve cubile paternum:
Non orthodoxus; filia si meretrix.

The last cause however, was insufficient, if the parent did not provide her a husband before she arrived at the age of twenty-five.

I have already mentioned the English law of revocations: and the rule that the heir shall not be disinherited by implication. To the same principles may be referred the rule that a wife shall not be deprived of dower by implication. *Webb v. Evans*, 1 Binn. 565.

Quia plerumque parentes.] The plaint, or action, in the case of an undutiful testament, which civilians call *testamentum inofficiosum*, is not in use in *England*; where, by the common law, all persons intitled to make a will, have ever had a free power of bequeathing their goods and chattles, in whatever manner they thought best; and it was only by the particular custom of some places, that this power was restrained: so that the writ called *breve de rationabili parte bonorum*, which the wife or children of the deceased had against the executors for the recovery of part of the goods, was not general throughout the kingdom, but peculiar to certain countries, where the custom was, that, debts being paid, the remainder should be divided into three equal parts; *viz.* one to the wife, another to the children, and a third to attend the will of the testator. *Cowel lib.* 2. *t.* 18.

The custom of reserving a reasonable part of the goods for the widows and children of testators is still in force in the city of *London*, as to the widows and children of freemen; but in other parts of the kingdom, where this custom did formerly prevail, it has been abolished by act of parliament; see 4 and 5 *Will.* and *Mary*, *cap.* 6. The inhabitants of the province of *York*, are also impowered to dispose of their personal estates by their wills, notwithstanding the custom of that

province, as to the reasonable part claimed by widows and children; but the act excepts the cities of *York* and *Chester*; yet the same liberty was afterwards extended to the freemen of the city of *York*, by the statute of the 2d and 3d of Queen *Anne*. And by the 7th and 8th of *William* the 3d, *cap.* 38. the same custom was abolished in the principality of *Wales*. See Dr. *Strahan's* notes on *Domat*, vol. 2. p. 109.—But, by the law of *Scotland*, a testator can not by testament deprive his wife or children of their legitimate or reasonable part. *Stair's inst. lib.* 3. *t.* 8. *Mackenzie's inst. lib.* 3. *t.* 9. *p.* 251.

Hoc colore.] This pretext was made use of to avoid the appearance of impugning the testament of a man in his senses, contrary to the authority of the 12 tables, which give all persons, capable of making a will, a free and uncontrouled power of bequeathing their effects just as they think proper. "*Verbis legis* 12 *tabularum his*, uti legassit "suæ rei, ita jus esto, *latissima potestas tributa videtur, et hæredis in-* "*stituendi, et legata et libertates dandi, tutelas quoque constituendi; sed* "*id interpretatione coangustatum est*, &c. *ff.* 50. *t.* 16 *l.* 120. de verb. "sign." *Harris.*

§ 1. *Qui de in officioso agunt*, p. 146. *Constitutionibus*, Cod. 8. 28. 21. and 27.

Aut agentes vincere, Dig. 5. 2. 6.

The eight causes for which a parent might be disinherited, are included in the following verses, and may be found in Nov. 115. ch. 4.

Si capitis natum pater accusaverit; ejus
Aut vitæ insidias, clamve palamve struat:
Si vetuit cupidum secreta novissima mentis
Prodere; nec veritus sit temerare nurum:
Si pater et genetrix sibi fata scelesta minentur:
Fulcra non ad nati clausa furentis eant:
Filius auxilio si non patris hostica linquit
Limina: si genitor numen inane colit.

That is, parents are not to be pretermitted, or disinherited by name, unless for one or other of the following causes specifically alleged.

1st, If the parent hath by accusation put in jeopardy the son's life, unless in case of treason: 2dly, or attempted it by poison or by sorcery: or 3dly, debauched the wife or concubine of his son: or 4thly, prevented the lawful exercise of the son's right of devising: or 5thly, been convicted of attempting by poison or otherwise the life of his wife; or the life of her husband: or 6thly, refused to take care of any of their children who might be deprived of reason: or 7thly, ac-

glected to redeem a child from captivity: or 8thly, abandoned the orthodox faith.

The allegation of inofficiousness was extended in favour of brothers and sisters; Cod. h. t. 21. 27. Cod. Theodos. eod. Dig. 5, 2. 14. 1. and Ib. l. l. 24. 25.

§ 2. *Qui alio jure veniunt et de inofficioso non agunt*, p. 147. This allegation did not lie, in favour of

1st, A son omitted in his father's will; for this would suffice to nullify it.

2dly, Daughters or grand-children omitted: for they had a remedy under the constitution of Marcus Antoninus.

3dly, Emancipated children omitted: for they might be called to the possession by the prætor, *per possessionem bonorum contra tabulas*. Dig. 5. 2. 23. Yet the father of an emancipated son, seems to have both these remedies; Dig. 37. 12. 1. ult.

4thly, an omitted posthumous child; for he can break the will. Dig. 5. 2. 6.

5thly, An adrogated minor under fourteen, disinherited by his adoptive father: for he is entitled to his fourth part, under the law of Antoninus Pius. Dig. 5. 2. 8. 15.

6thly, A child to whom his father has left his portion. Dig. 5. 2. 25. Cod. eod. l. 30.

The right to urge this complaint, (which must be brought in five years, Dig. 37. 4. 4. and 37. 4. 8. 1. Cod. eod. tit. 28. l. 3. § 34.) passes by a decree of Justinian to the immediate legitimate heirs of the person, who might have urged it during life. Cod. eod. *si quis*, &c. and *scimus*, &c.

§ 3. *De eo cui testator aliquid reliquerit*, p. 147. The action to recover the legal portion, or the difference between the bequest and the fourth part, was entitled *condictio ex lege*; and enured to the heirs of the person originally entitled to bring it. Nor was it renounced by implication: it must have been expressly given up, if at all. *Peregrinus fidei comm.* Art. 36. num. 93. Cod. de inofficioso test. l. 30.

§ 6. *De quarta legitimæ partis*, p. 148. See Cod. 3. 28. 35.

I have already mentioned, that, in my opinion, the right of bequeathing by will, is no natural right: it is the creature of society, and may fairly and prudently be limited.

Plato considers a man's property as belonging to his family, lib. xi. de leg. which was the Roman doctrine of *suitas*. In Greece, Solon first introduced the right of devising. Plut. in Solon. Demosth. adv. Lept. The law of the twelve tables on this subject was imported from

Athens. But the Romans made frequent attempts to restrain the right. Thus the *Lex Furia*, *a plebiscitum*, A. U. C. 570. restricted the amount of legacies to other persons than the heir, at a thousand *Asses*; and the legatee receiving it, was subject to a penalty. The *Lex Voconia*, A. U. C. 584, enacted that no legatee should receive more than the heir. The *Lex Falcidia*, under Augustus, secured to the heir a fourth part of the estate, by restraining the testator from bequeathing in legacies *ultra dodrantem* or nine ounces. Justinian, by the 18th novell. assigned one third of all the goods of the testator to the children if they amounted to four or fewer, and one half if they were more than four. Thus *two* children would divide between them four ounces, *five* children six ounces; agreeably to these verses.

Quatuor aut infra dant natis jura Trientem:
Semissem *vero dant natis quinque vel ultra.*

See on this subject, Dig. 48. 20. 7. Cod. de inoffic. testam. 36. Nov. 1. princip. et § 1. Cod. de inoff. test. 31. Cod. ad leg. Jul. majest. 5. § 3. Nov. 66. ch. 92.

The children excluded from this *legitima pars*, or share of the paternal property thus secured to them by law, whether excluded by voluntary or legal reasons, do not on this account augment the *quarta pars* or legal portion of the rest. As if one out of five children were disinherited for just cause, or took the veil, the other four would not be entitled to six ounces, for the legal portion was founded on the right of heirship or succession.

Grand children were reckoned *per stirpes*, by stock: thus all the children of a son counted as the son.

In cases of dispute as to the mode of division or remuneration, it was usually referred to arbitration; *arbitrio boni viri.* Cod. l. 3. tit. 28. § 36.

The action for the recovery of the supplement, or difference between a legacy bequeathed and the legal portion, enured to the heirs of those who had a right to sue. It was even assets to the creditors, although the heir should have renounced. Cod. de repud. bon. possess. l. 2. Dig. 38. 9. 1. 7.

Previous to the 115th novel. whatever the heir had received whether as heir, as legatee, *mortis causa*, or by way of trust, was considered as advancement, and deducted from his portion or fourth part; except a donation inter vivos, or gift with actual transfer by the testator in his life time. After this novel. the heir entitled to his legal portion became entitled without these deductions as it should seem; see Cujas in Dig. 35. 2. 15. penult. and perhaps reasonably, for the legal portion is due

by the settled provisions of positive law; the gifts and legacies arise from the casual inclination of the testator; who therefore could neither transfer or burthen with debts, usufructs, or trusts, even for pious purposes, the portion cast by operation of law. Cod. de inoffic. test. l. 36.

In the modern French code (art. 913. of Code civ. Nap.) the *Quotite* or portion of disposable property is limited in favour of the children. "*Les liberalites soit par actes entre vifs, soit par testament, ne pourront* "*exceder la moite des biens du disposant s'il ne laisse a son deces qu'un* "*enfant legitime; le tiers s'il laisse deux enfants; le quart s'il laisse* "*trois ou un plus grand nombre.*"

In England the law permitted devises of *personal* property time out of mind: 2 Fonbl. B. 4 pt. 1 ch. 1 § 1. n. (a): but devises of *land* were first allowed by Stat. 32, 34, 35 Hen. 8. see *Hungerford v. Nosworthy*, Show. P. C. 147. As to the civil and canon law authority in the ecclesiastical courts on the subject of legacies, see 2 Fonbl. Ib. § 4. note.

By the law of England, and most part of the American states (New-Orleans I believe adopting the principle if not the regulations of the Code Napoleon) there is no restriction on the permitted right of bequeathing. Doubtless the parent ought to retain some check on the misbehaviour of children, and so I think ought the laws on the caprice, the injustice or the dotage of parents. In Holland, Germany and Spain, and as I have understood in other parts of Europe, the principles of the Falcidian law more or less limited or extended, have been generally adopted; and it is worth notice, that the experience of the Empire from the time of Augustus to that of Justinian, led to a gradual extension of those principles.

The civil law doctrine of *advancement* by gift to children, during the life-time of the testator, briefly laid down in this section, gave birth to the modern law of England respecting the satisfaction of portions by legacies, and the ademption of legacies by the advancement of portions: concerning which, the cases are numerous and complicated. * *Ellison v. Cookson*, 1 Vez. jun 105.

---

* The general doctrine of *satisfaction*, relates either to children: to husband and wife: or to strangers. The first class only, is immediately connected with the subject of the present section; but it may be useful to refer shortly to the leading cases of the two other classes.

As to husband and wife. 1 Vez. sen. 323. 2 Vez. sen. 409. 1 Eq. Ca. ab. 203. Finch's Prec. Ch 240. 2 Vern. 498. 555. 709. 724. 1 P. Wms. 324. 2 P. Wms. 341. 614. 3 P. Wms. 15. 228. 353. 3 Atk. 419. 1 Bro.

Where a parent is under covenant to provide portions for children, provision by will shall be held to go in satisfaction, unless the contrary appear: and legacies shall be adeemed, by portions advanced during the testator's life-time, unless the terms or circumstances of the legacy negative this implication. For it shall not be intended that a parent means to give any child a double portion.

Jenkins v. Powel, 2 Vern. 115.
Thomas v. Keymish, 2 Vern. 348.
Brown v. Dawson, Ib. 498.
Wilcox v. Wilcox, 2 Vern. 538.
Phinney v. Phinney, 2 Vern. 638.
Atkinson v. Atkinson, 1 Vez. Senr. 262.
Graham v. Graham, 1 Vez. Senr. 263.
Barret v. Beckford, 1 Vez. Senr. 520.
Blois v. Blois, } 2 Ventr. 347.
Pyne's Case, }
Ward v. Lant, Finch's Prec. Ch. 183.
Hoskins v. Hoskins. Ib. 263.
Hartop v. Whitmore, Ib. 541 (and 1 P. Wms. 681. but incorrect, see 1 Br. Ch. Ca. 306).
Bromley v. Jefferies, Ib. 138.
Copeley v. Copeley, 1 P. Wms. 147.
Lechmere v. Earl of Carlisle, 3 P. Wms. 211.
Graves v. Boyle, 1 Atk. 509.
Biggleston v. Grubb, 2 Atk. 48.
Rosewell v. Bennet, 3 Atk. 77 e. con 1 Eq. Ab. 204.
Clark v. Sewell, 3 Atk. 98.
Lee v. Cox, and D'Aranda, Ib. 419.
Upton v. Price, Cas. Temp. Talb. 71.
Watson v. Earl of Lincoln, Ambl. 325.
Richman v. Morgan, 1 Br. Ch. Ca. 63. and 2 Br. Ch. Ca. 394.

---

ch. ca. 82. 129. 2 Br. ch. ca. 95. 1 Vez. jun 257. 2 Vez. jun. 463. 644. 4 Vez. 391. 5 Vez. 382. 6 Vez. 385. 10 Vez. 1. 17. 18. 5 Br. Par. Ca. 567. 7 Br. P. Ca. 12, compared with 2 Vern. 504. Ambl. 466. 682. 730.

As to relations and strangers. 1 Vez. sen. 126. 263. 519. 636. Finch's Pr. Ch. 236. 394. 2 Vern. 478. S. C. 1 Eq. ab. 203 S. C. 2 Eq. ab. 352. salk. 155. 508. 1 P. Wms. 408 2 P. Wms. 132. 343. 553. 3 P. Wms. 226. 353. 1 Atk. 426. 2 Atk 300. 493. 519. 632. 3 Atk. 65. 96. Gilb. ch. 324. Gilb. Eq. rep. 89. 1 Br. ch. ca. 170. 3 Br. ch. ca. 192. 3. Vez. jun. 529. 561. 564. 4 Vez. jun. 483. 574. 5 Vez. 369. 382. (cases of double legacies).

Moulson v. Moulson, 1 Br. Ch. Ca. 82.
Warren v. Warren, 1 Br. Ch. Ca. 305.
Ackworth v. Ackworth, Ib. 307.
Finch v. Finch, 4 Br. Ch. Ca. 38.
Hinchcliffe v. Hinchcliffe, 3 Vez. jun. 516.
Sparkes v. Cator, Ib. 530.
Tolson v. Collins, 4 Vez. 491.
Leake v. Leake, 10 Vez. 489.

On these cases it may be observed

1st. That the intent and meaning of the testator is to be sought, and parol evidence may be admitted to discover it. *Deacon v. Smith* 3 Atk. 326. *Ellison v. Cookson*, 3 Br. Ch. Ca. 61. *Mascal v. Mascal*, 1 Vez. sen. 323. *Rosewell v. Bennet*, 3 Atk. 77. 1 Eq. Ca. Ab. 204. *Chapman v. Salt*, 2 Vern. 646.

Rosewell v. Bennet, 3 Atk. 77. All these cases go generally to the admissibility of evidence, whether to aid or rebut a presumption. But in *Freemantle v. Banks*, 5 Vez. 79. and *Eden v. Smith*, Ib. 341. and *Trimmer v. Bayne*, 7 Vez. 508, it is laid down that parol evidence ought only to be admitted to rebut an equity or presumption. In *Pole v. Lord Somers*. 6 Vez. 321. the doctrine is discussed. I incline to think that parol evidence ought not to be originally admitted to establish a presumption, but the question seems not perfectly at rest.

2ly. There seems to be a distinction between ademption or satisfaction, and performance; though this is rather discountenanced by *Prime v. Stebbing*, 2 Vez. sen. 411. But it seems to me that the more modern rule is reasonable; viz. that where the question is, whether a legacy shall be considered as the performance of a covenant, more strictness is required, than where the question is, whether a portion shall adeem a legacy. The first has parties, and is more in the nature of a debt: the second moves from the parent alone, and the only difficulty arises from the appearance of a double bounty, and family partiality. See *Clark v. Sewell*, 3 Atk. 98. *Trimmer v. Bayne*, 7 Vez. 515.

3ly. Courts disincline to *extend* the doctrine of satisfaction, and therefore take hold of circumstances that will reasonably enable them to consider a legacy as a bounty, *Clark v. Sewell*, 3 Atk. 98. *Tolson v. Collins*, 4 Vez. 483. *Rickets v. Livingston*, 2 Johnson's Cases, N. Y. 101.

Hence, it has been decided,

That the devise of a residue is not a satisfaction, for it is uncertain. *Alleyn v. Alleyn*, 2 Vez. sen. 37.

That a legacy is no satisfaction of an open account. *Chancy's case* 1 P. Wms. 408.

That a legacy is no satisfaction if it be less in amount; *Eastwood v. Vincke*, 2 P. Wms. 6. 14. *Phipps v. Annesley*, 2. Atk. 57. *Nichols v. Judson*, 2 Atk. 300. But in some cases, a legacy has been decreed a satisfaction *pro tanto* *Jesson v. Jesson*, 2 Vern. 255. *Thomas v. Keymish*, Ib. 348. *Bruen v. Bruen*, Ib. 439. *Warren v. Warren*, 1 Br. ch. ca. 305. *Sparkes v. Cator*, 3. Vez. 530. *Graham v. Graham*, 1 Vez. sen. 263.

That a legacy depending upon a contingency is no satisfaction. *Jeacock v. Falkner*, 1 Br. ch. ca. 295. *Bellasis v. Uthwaite*, 1 Atk. 426. *Spinks v. Robins*, 2 Atk. 491. *Clarke v. Sewel*, 3 Atk. 98.

That money and lands are not mutually satisfactions. *Eastwood v. Vincke*, 2 P. Wms. 614. *Chaplin v. Chaplin*, 3 P. Wms. 245. *Cranmer's Case*, 2 Salk. 508: and generally, that the presumed satisfaction should be of the same nature, extent, and certainty, as the covenant or obligation. *Barret v. Beckford*, 1 Vez. 519. *Hanbury v. Hanbury*, 2 Pr. ch. ca. 352. 549. *Powell v. Cleaver*, 2 Br. ch. ca. 499. *Baugh v. Read*, 3 Br. ch. ca. 192. 1 Vez. jun. 247. *Smith v. Strong*, 4 Br. ch. ca. 493. *Grave v. Salisbury*, 1 Br. ch. ca. 425.

That where the legacy is disadvantageous as to its time of payment, it is no satisfaction in case of a debt; as a legacy made payable in a month; where the debt is due presently. *Clarke v. Sewell*, 3 At. 97. Though this is not held so strictly in cases of portions, *Jesson v. Jesson*, 2 Vern. 255.

That a sum arising from distribution under an intestacy, is no satisfaction, *Twisden v. Twisden*, 9 Vez. 4. 25.

That legacies or beneficial interests, bequeathed by, or proceeding from strangers, are no satisfaction of a covenant entered into by the testator. *Hanbury v. Hanbury*, 2 Br. ch. ca. 352. 549.

That a legacy is not *prima facie* a satisfaction of the testator's covenants by settlement or otherwise to provide for his family, wherever the claims are protected by securities strictly legal, as bonds. *Couch v. Stratton*, 4 Vez. junr. 491. *Tolson v. Collins*, Ib. 483. *Kirkman v. Kirkman*, 2 Br. ch. ca. 95. *Jeacock v. Falkener*, 1 Br. ch. ca. 295. *Haynes v. Mico*, 1 Br. ch. ca. 129. 133.

That a legacy is not a satisfaction for monies received by the testator in trust for his children. *Chidley v. Lee*, Finch. 228. *Meredyth v. Wynn*, Ib. 314. (Sed vid. *Seed v. Bradford*, 1 Vez. 501.) or generally, of claims arising aliunde. *Baugh v. Reed*, 3 Br. ch. ca. 192.

That where an express fund is pointed out, or an express direction

given for payment of debts and legacies, the court will infer that *both* are to be paid. *Chancery's* case. 1 P. Wms. 408. *Richardson v. Greese*, 3 Atk. 65.

These are the leading principles, and distinctions that occur to me on this prolific subject.

As to the release of debts by legacies, the intention of the testator must be clear, or the inference will not take place. See hereon *Brown v. Selwyn*, Cas. Temp. Talb. 240. *Sibthorp v. Moxon*, 1 Vez. 49. *Wilmot v. Woodhouse*, 4 Br. ch. ca. 227.

Tit. XIX. § 2. *De suis hæredibus*, p. 150. *Sed his prætor permittit.* But not after they have begun to act; *immiscere se.* Cod. de repud. vel. abst. heredit. 1 and 2. Dig. 29. 2. 20. 21.

Immiscere se, means to act as heir. } These are expressions appertaining to the heir.
Abstinere, to decline the heirship. }

Adire, to approach: to act in succession. } Are expressions appropriate to the *hæres extraneus*, or stranger.
Pro hærede res gerere, to transact business as heir.
Repudiare, to renounce the succession.

§ 4. *De testamenti factione*, p. 151. *Testamenti factio activa*; the right of devising. *Testamenti factio passiva*; the right of taking by devise. *Testamenti factio*, also sometimes means the capacity of being a witness to the last will of another.

Qui ut diximus tua tempora inspici debent. See Dig. 28. 5 49. 50. Dig. 28. 1. 16. This relates to stranger heirs. The *hæredes sui*, proper or domestic heirs, are only required to posses the right of taking *(testamenti factio passiva)* at the death of the testator.

§ 5. *De jure deliberandi*, p. 152. By the ancient law no time was limited for deliberation. Sometimes testators assigned a period of 100 days. When they did not, the prætor on application of a substitute or a creditor, would himself assign a time, usually 100 days at least. Dig. 28. 8. 1. 2. cum seq. Cod. de jure delib. l. 19. Dig. 29. 2. 28. Justinian extended it to one year. Cod. eod. l. 19. afterwards he abridged this period to three months, Cod. eod. l. ult. unless under peculiar circumstances, wherein the prætor might extend it to a year, and an inferior magistrate to nine months. Cod. de jur. delib. l. ult.

But minors, from their inexperience in business, were allowed to renounce, Cod. si minor, ab hered. abst. l. 1. Dig. 4. 4. 7. 1. unless where it became insolvent by accident after he took it. Dig. 4. 4. 11. 24. § 2. Cod. de integ. rest. minor. l. ult.

Sed nostra benevolentia, &c. In Ferriere and others, this passage begins another section, relating to the privilege of inventory.

The inventory by which the claims upon the heir were to be bound, required 1st. To be commenced within one, and finished within three months, from the death of the testator. Cod. de jur. delib. l. ult. 2ly. It was to be made out in the presence of creditors and legatees duly notified, Novell. 1 ch. 2. § 2. Ib. 119. ch. 6. 3ly. It was to contain a full and fair account of all the property of the deceased real and personal, Cod. de jur. delib. l. ult. § 10. 4ly. It was to be signed by the heir claiming under it. Beyond this inventory the heir was not liable, unless he had thought fit to ask time to deliberate, which was considered as a waiver of inventory. Cod. eod. l. ult.

§ 6. *De acquirenda vel omittenda, &c.* p. 153. Strangers might accept three ways:

1st, By *Adition: (adire magistratum)* and formally declare their intention of accepting the heirship: this must be simply and unconditionally, without power of subsequent renunciation. Dig. 29. 2. 51. et ult. l. 80. eod. § 2. l. 90. eod. § 3.

2dly, By *Cretion:* declaration being made before the magistrate within the time limited by the testator. From *Crevi, a cernere*, to decree.

3dly, *Pro hærede gestio:* Acting as heir. Dig. 29. 2. 20. et seq. Ib. l. 88. § 7.

They might renounce,

1st, By repudiation before a magistrate.

2dly, By any expression or act implying renunciation. Dig. 29. 2. 95.

3dly, By omitting to take up the heirship within the limited period.

After the time of Theodosius the younger, and Justinian, *Adition, Cretion* and *Repudiation*, were laid aside. Heirships were accepted in two ways only, *pro hærede gestione, and agnatione nuda.* Cod. de jur. delib. l. 6. 12 and 17. Cod. Theod. de bon. mat. l. 1. 4 and 8. Ib. de Cretion. Ib. et bonor. possess. sublat. Cod. qui admitt. ad bonor. possess. *Scrupulosam cretionum solemnitatem hac lege penitus amputari decernimus.* Cod. 6. 30. 17.

Item extraneus hæres.] The law of *England* takes no notice of proper or domestic heirs, and therefore can make no distinction between *sui hæredes* and *extranei;* but in *England*, if an executor, [who may be regarded as the heir of personal estate] once intermeddles with the estate of the testator, he will not afterwards be permitted to renounce his executorship; and yet he is not liable *de bonis propriis* to pay more than he has received, unless in some particular cases, as when he hath wasted the estate of the deceased, or acted otherwise improperly

and dishonestly—and even an executor *de son tort* will in general be charged only to the amount of the goods wrongfully administered by him. 1 Mod. 213. *Parten v. Baseden.*—Swinb. 337. Harris.

Tit. XX. § 1. *Legatum itaque est donatio*, p. 154. In England under the word *legacy*, land may be included. Doug. 40. *Brady v. Cubitt*, and the cases cited in the note. Also *Hardacre et al. v. Nash et al.* 5 Term rep. 716.

It is truly said here that a legacy is a gift, a bounty. This is certainly the *prima facie* intention of the testator: hence it is, that the courts rather lean against the doctrine of ademption and satisfaction as to debts: for it is converting a gift into a payment. See in addition to the cases already cited lately, 1 Brown's civil law, 304. 3 Woodeson, 538. 2 Fonb. 320. 2 Johnson's New-York cases, 101.

§ 2. *De antiquis generibus legatorum sublatis*, p. 154. *Sed ex constitutionibus.* Cod. 6. 37. 21. *Nostra autem constitutio.* Cod. 6. 43. 1.

The forms thus abrogated were, 1st, *Per vindicationem.* As, I give and bequeath, positively. 2dly, *Per damnationem.* I direct my heir to deliver over and pay. 3dly, *Sinendi modo.* My will is that Titius be permitted to take, &c. 4thly, *Per præceptionem.* Let Titius take so much of such a thing, or such a thing, except, &c. The first and fourth amounted to a transfer in full right, and were recoverable under the action *familiæ erciscundæ.* The two others allowed only of a personal action *ex testamento.* Under the later ordinances, the legatee might have his action against the heir or any other possessor of the thing devised: and an hypothecary action for immoveable or real property, so termed, under the fiction that all the goods of the testator were hypothecated or pledged for the delivery of each legacy from the time of his death. But co-heirs were not bound beyond their proportion. Cod. comm. de legat. l. 1.

It may be remarked, that the courts in England, after having been long tramelled by particular decisions, and technical constructions, have adopted the golden rule of this section for the expounding of last wills and testaments, viz, that whatever be the form of words made use of, the intention of the testator must govern if it can be gotten at, even in opposition to partial expressions; unless that intention militates against some known rule of positive law, as in creating a mortmain or a perpetuity.

§ 3. *Collatio legatorum*, &c. p. 154. See Cod. Commun. de legat. 2. The passages to the same purpose, to wit, that legacies are in all respects likened to trusts in Dig. 30. 1. only as to the deduction under

the Falcidian law of the fourth or legal portion, according to Cujas, l. 8. observat. ch. 4.

§ 4. *De re legata*, p. 156. See Dig. 30. 14. 1. Dig. 30. 67. 1. and Dig. 30. 71. 3. as to paying over the value. If a specific legacy, can be reasonably obtained by purchase, it is of no consequence, whether the testator knew it to be the property of another or not. Dig. 30. 49. 3. The *onus probandi* was thrown on the legatee. Dig. 22. 3. 21. Cod. eod. l. 23.

§ 5. *De re aliena post testamentum a legatario acquisita*, p. 157.

Nam traditum est, quas lucrativas causas, &c. See Dig. 44. 7. 17. Dig. 30. 82. As to the latter part of this section see Dig. 30. 34. 8. and 30 84. 2, juncto Cujacio, Dig. 50. 16. 88. Dig. 4. 4. 35.

Nam traditum est.] When it is said, that two lucrative titles can never concur in the same person on account of the same thing, this must be understood in regard only to something certain and determinate, as a particular purse of money, an horse, a diamond, &c. for the maxim does not hold in general with respect to things, which consist in quantity, and may be numbered, weighed or measured.—*Possunt enim duæ causæ lucrativæ in eandem personam et eandem quantitatem concurrere, quia quantitates per rerum naturam multiplicantur; licet enim eadem res mea sæpius fieri non possit, eadem tamen quantitas possit quia res eadem non videtur.* Cujacius; Ferriere. Harris.

Agere potest: In England no suit lies for a legacy at common law. The mayor of *Southampton v. Graves*, 8 Term. Rep. 593. Unless upon the express promise of the executor in consideration of assets, *Atkyns v. Hill*, Cowp. 284. *Hawkes v. Saunders*, Ib. 289. But the case of *Deeks v. Strutt*, negatives an implied assumpsit by virtue of assets. Whenever the ex'or. assents, the legacy vests from that moment. *Doe v. Guy*, 3 East. 120.

In Pennsylvania, by act of 21 March, 1772, legatee may bring suit after reasonable demand, and offer of sufficient security in double amount, conditioned to refund if necessary.

§ 10. *De re legatarii*, p. 159. *Et licet alienaverit eam.* That is, according to the old Catonian rule; and also *quod ab initio vitiosum est, tractu temporis non potest convalescere*, Dig. 50. 17. 29. but this rule does not apply to conditional legacies, Dig. 34. 7. 1. § ult.

§ 12. *De alienatione et oppignoratione*, &c. p. 159. As in this case the heirs could object to paying the value of, or redeeming the thing bequeathed, on the ground that the testator, by his alienation, had in fact repealed the bequest, he will be bound to make out this plea. The contrary, however, seems intimated in Dig. 34. 4. 15. but in this last case, the plea is put in by the legatee, that the desire of bequeath-

ing returned upon the testator. *Sane si probet legatarius novam voluntatem testatoris non submovebitur.*

It should seem that if the testator hath only mortgaged or pledged the thing bequeathed, this does not amount to an evidence of a change of intention. Precisely the rule adopted by the English court of chancery as to a devise of lands, or any other specific property. But it would be otherwise had he sold it or given it away. Dig. 34. 1. 18. And so is the law of England.

§ 14. *De debito legato creditori*, p. 160. This case involves the confliction of two rules apparently opposite. *Quæ semel utiliter constituta sunt, durant licet ille casus extiterit a quo initium capere non potuerunt.* Dig. 35. 2. 5. And the rule *negotium extinguitur, cum is casus postea incidit unde incipere non poterat.* Dig. 30. 1. 82. Concerning which see Dig. 50. 17. 85. 1. where this latter rule is repeated: and Dig. 50. 16. 98. with the note of Vinnius.

I have already stated most of the cases, where a legacy will be considered as an extinguishment of a debt. The general rule doubtless is that a legacy equal to the debt or exceeding it, shall be considered as a satisfaction; see the cases before cited hereon; and Roper on legacies, 163, where also many of them are collected: and *Gibson et ux. v. Scudamore*, Moseley rep. 7. but if less than the debt, it shall not be satisfaction, *Minuel v. Sarrazine*, Mosely rep. 295. 1 Vez. sen. 263. Finch. 394. Nor unless the bequest be at least equally beneficial. Roper on leg. 165. Nor if the bequest be not *ejusdem generis. Garret v. Evers*, Mosely rep. 364. Nor if the debt be contracted subsequent to the date of the will. 2 Salk 508. *Cranmer's case. Thomas v. Bennet*, 2 P. Wms. 343. and *Fowler v. Fowler*, 3 P. Wms. 353. See also the observations of lord Thurlow in *Haynes v. Mico*, 1 Br. ch. ca. 130, expressing strong leaning against any extension of the doctrine of satisfaction.

§ 15. *De dote uxori legata*, p. 161. The dower or marriage portion was payable in three annual payments only, *annua, bina, trina die.* Hence, if it was bequeathed also, it became due from the day of the testator's death, and bore interest from that time. Cod. de rei uxor. act.

I have already referred to the cases wherein question, has arisen whether the interest of a wife by settlement or otherwise is satisfied by legacy. Neither in England, nor in Pennsylvania, can a husband deprive the wife of her election to take under the wills or to resort to, or forego her dower.

§ 16. *De interitu et mutatione rei legatæ.* p. 161. If a testator bequeath generally a cask of wine, and all his wine by accident runs out,

the heir will be bound to pay the legacy: but if he should bequeath by description, some particular wine in the cellar, and it runs out, the loss falls on the legatee. Dig. de legat. 34 § 3. *Cod. si certum petat. l.* 11.

§ 18. *De grege legato.* p. 162. Ten sheep make a flock. Dig. 47. 14. ult. Dig. 7. 4. ult. *Grege autem legato, &c.* Dig. de legat. l. 21. *Jefferys v. Jefferys*, 3 Atk. 121.

§ 19. *De ædibus legatis.* p. 163. As to what things will pass by the words house, furniture, goods, &c.; see the cases collected by Roper on Leg. 136. et seq. add to those cases, as to plate: *Phillips v. Phillips*, 2 Freeman 11. *Flay v. Flay*, Ib. 64. *Kelly v. Pawlet*, 1 Dick. ch. rep. 359.

As to books: *Allen v. Allen*, Moseley 112. *Kelly v. Pawlet*, Ambl. 605.

As to apparel: *L'Farrant v. Spencer*, 1 Vez. sen. 97. *Hunt v. Hort*, 3 Br. ch. ca. 311.

As to the general exposition of what passes by particular expressions, see the cases of *Stuart v. Earl of Bute*, 11 Vez. 657, and *Kelly v. Pawlet*, Dickens ch. Rep. 359, and Ambl. 605.

The general doctrine of fixtures is discussed in *Elwes v. Maw*, 3 East 38.

If a testator having bequeathed ground, afterward builds upon it, the building will fall to the legatee, as an accessary. Dig. de legat. 39. 44.

§ 21. *De rebus corporalibus et incorporalibus.* p. 165. This is agreeable to the English law, by which a possibility may be bequeathed. Bank notes whether considered as cash, or securities for cash? 11 Vez. 662. *Chapman v. Hart*, 1 Vez. sen. 273.

There is some difficulty in the English law, as to bequests over, and limitations of personal estate: the general rule is that no remainder over of personal estate can be devised: but there are many distinctions taken as to the operation of words of limitation, in bequests of personal estate: see Roper on Leg. 202. et seq. and *Cambridge v. Rous*, 8 Vez. 24.

§ 22. *De legato generali*, p. 164. This abrogates the law, consequent upon the bequest *per damnationem* which gave the election to the heir, see tit. XX. ante.

§ 23. *De optione legata*, p. 164. *Sed ex constitutione.* Cod. 6. 43. ult.

§ 25. *Jus antiquum de incertis personis*, p. 165. *Sacris constitutionibus.* These are not extant.

§ 29. *De errore in nomine legatarii*, p. 167.

Nomen, was the family name.

Cognomen, the name of that branch of the family placed after the nomen.

Preenomen, the name of the individual prefixed to the nomen.

Agnomen, a name assumed from some particular circumstance.

Thus, Publius, Cornelius, Scipio, Africanus: Caius Julius Cæsar: here Cornelius and Julius were the *nomina*, the family names.

Scipio and Cæsar were the *cognomina*, the one of the *gens* or family Cornelia; the other of the *gens* Julia.

Publius and Caius designated the individuals. The individuals in respect of the original family or clan, were *agnati*; in respect of the particular branch of the family, they were *gentiles*.

The rule here laid down as to the name, holds also under the civil law, as to the thing. Although it may be miscalled, yet if the description or appellation be sufficient to designate the article or person intended, it is sufficient. Dig. de légat. 1. Dig. 33. 10. 7. 2. Dig. 34. 5. 3.

As to mistakes and incertainty in a bequest under the English law, see Roper on Leg. 157. et seq. and the following cases, *Thomas v. Thomas*, 6 Term rep. 671. *Doe ex dem. Hayter v. Joinville et al.* 3 East, 172. *Earl of Scarborough v. Parker*, 1 Vez. Jun. 267. *Parsons v. Parsons*, Ib. 266, and the cases in the note, p. 267, which bear upon the present section. See also *Ex pte Wallop*, 4 Br. ch. ca. 90 and *Kennel v. Abbot*, 4 Vez. 802, where a legacy given to a person under a particular character, which he has falsely assumed, and which moved the testator to the bequest, the rule of the civil law is adopted, and the legacy fails. Dig. 35. 1. 72. 6. Cod. 6. 42. 27. cited. See Swinburne, 473, et seq.

§ 30. *De falsa demonstratione*, p. 167. Dig. 35. 1. 19. 34. Dig. 12. 1. 6. But this rule could not apply to a legacy of a thing that did not exist, for of this there could be no delivery. Dig. de legat. 73. 1 and 2. Lex eod. 108, § 10. See 5 East, 51. *Roe on the demise of Connolly v. Vernon and Vyse.*

§ 31. *De falsa causa adjecta*, p. 168. Dig. de legat. l. 17, § 2. cum seq. First, because the legacy is fairly referrable to the good will and intention of the testator, which remain at all events. Secondly, the legacy itself, and not the reason of it, attaches to the legatee.

§ 32. *De servo heredis*, p. 168. The legacy has relation to the time of the testament and it was then clearly void: for a slave could acquire only for the use of his master; *i. e.* as a general rule. Hence the dictum of Cato applies, *quod ab initio vitiosum est, tractu temporis non potest convalescere.* Dig. de diversis reg. jur. 29.

Quæritur.] If a testator gives a legacy to the slave of his heir without annexing any condition, such a legacy is void; for a bequest, made to the slave, is in effect made to the heir; and it would be highly absurd in a testator to command his heir to pay a legacy to himself. And although the slave of the heir should afterwards cease to be under the power of his master in the life-time of the testator, either by passing to another master, or by obtaining his freedom, yet this would give no force to the legacy; for it is laid down as a rule by *Cato; quod, si testamenti facti tempore decessit testator, inutile foret; id legatum, quandocunque decesserit, non valere.* ff 34. t. 7. But when legacies are conditional, this rule is not observed; for in such bequests nothing is regarded but the event of the condition. Harris.

§ 33. *De domino hæredis*, p. 169. The legacy cannot belong to the slave as heir: for it is evident the master may prohibit him from becoming heir, or sell him to another master.

§ 34. *De Legato post mortem hæredis*, p. 169. Formerly, as has been already remarked, the institution of an heir was so necessary to a testament, that any bequest in a will previous to such institution was void. By degrees the prætors excepted Trusts, *(fidei-commissa)* Ulp. in frag. tit. 24, § 14; and tit. 25, § 6, Juncto Paulo, l. 3 sentent. tit. 6, § 1. Justinian abolished this strictness, and gave validity to bequests, whether placed before or after the clause by which the heir was appointed. Cod. de testament. l. ambiguitas.

§ 36. *Si pœnæ nomine relinquatur*, p. 170. Antoninus Pius first raised an objection to these conditions *nomine pœnæ:* thinking that a legacy ought to be founded simply on the kindness and good opinion of the testator concerning the legatee; and that burthening a legacy with any thing like a penal condition, was contrary to the fair and reasonable intent of a gift. Ulpian in frag. tit. 24, 25, § 13. Justinian reinstated the old law. Cod. de his quæ pœnæ caus. relinq.

The very fruitful subject of conditions, is no farther related to the present section, than as it embraces testamentary conditions. The doctrine of conditions, says Mr. Butler in his note to Co. Litt. 201. 6. is derived to us from the feudal law. Doutless much of that doctrine so far as relates to tenures, services, and rents, is so. But as much of it, is derived to us from the civil law: see beside the present section concerning testamentary conditions, Inst. 2. 14. 11. Inst. 3. 16. 4, 5 and 6. Dig. 26. 7. 5. 8. Dig. 28. 7. l. l. 3. 14. Dig. 30. 1. 7. 9. Dig. 35. 1. l. l. 7. 17. 22. 31. 41. 62. 64. 72. 75. 79. Dig. 36. 2. 4. Dig. 44. 7. 31. Dig. 50. 17. 77. 174. Cod. 6. 25. 1. Cod. 6. 40. authent. cui relict. Cod. 6. 46. 4. and the summary of the French

law of conditions in Pothier on obligations, ch. 3. articles 1 and 2. (page 118—135. of the American translation. Newbern, N. C.) which is the same with the civil law on the same subject.

By the civil law, all conditions imposing celibacy, or widowhood, unless till the puberty of the orphan children were void: but legacies might be well given on the condition of marrying or not marrying such a person. Dig. 35. 1. 22. 62. 63. 64. 72. 100. But whether by ampliation this is to be construed against any conditional *restraint* of marrying a particular person? Swinb. 282.

As to the (English) common law doctrine of conditions, generally, see Butler's notes, Co. Litt. 201—207. and 213. 237. Comyn's Dig. tit. Conditions.

As to conditions precedent and subsequent, and covenants dependant and independant in contracts, see the useful note of Serjeant Williams to *Pordage v. Cole*, 1 Saund. rep. 319. which includes the cases to Trinity term, 1799; also 1 Fonbl. ch. 6, § 1 and 2. p. 249. 388. 391.

The leading case as to DEPENDANCE or INDEPENDANCE of covenants, is *Kingston v. Preston*, quoted in *Jones v. Berkely*, Doug. 689. As to the doctrine of COMPENSATION, *Boone v. Eyre*, 1 Hen. Bl. 273. *Campbell v. Jones*, 6 Term. rep. 573. *Hall v. Cazanove*, 4 East. 477.

Add to the cases cited in Williams's Saunders, *Glazebrook v. Woodrow*, 8 Term rep. 366. *Hall v. Cazanove*, 4 East. 477. *Martin v. Smith*, 6 East. 555. *Smith v. Wilson*, 8. East. 437. *Havelock v. Geddes*, 10 East. 555. *Smith v. Woodhouse*, 2 Bos. and Pull. New. rep. 233. *Bornmann v. Tooke*, 1 Camb. N. P. rep. 377.

When equity will relieve the breach of a condition: see 1 Fonb. 209. 220. 387. 391.

As to the subject immediately connected with the present section, viz. conditions in restraint of marriage; the cases are well collected and the general principles arranged by Fonb. vol. 1. p. 245. See also Rop. on leg. 59—66.

I add the following references on the same subject.

Randall v. Payne, 1 Br. ch. ca. 5. *Scot v. Tyler*, 2 Br. ch. ca. 431. See lord Thurlow's opinion and decree in this case at full length in 2 Dicken's Ch. rep. 712. The general law before this was, that conditions in restraint of marriage, were to be considered as in *terrorem* only, it not being to be presumed, that for a breach of duty of this pardonable nature, the parent would incurably deprive the child of an intended provision. *Harvey v. Aston*, Forrester's rep. 212. 1 At. 361. Comyn's rep. 726. *Reynish v. Martin*, 3 Atk. 330. *Elton v. Elton*, 1 Wils. 159. *Long v. Dennis*, 4 Burr. 2052. In which lord Mansfield

began by saying, " Conditions in restraint of marriage are odious, and " are therefore held to the utmost rigour and strictness. They are " contrary to sound policy. By the ROMAN law *they are all void.*" That is to be understood however, under the restrictions I have above laid down; to wit, the conditional injunction of celibacy—of widowhood, unless till the children arrive at puberty—of not marrying without the consent of some other person—or by ampliation of not marrying some particular person, was void: and the legacy was demandable free from the condition; Dig. 35. 1. 106: but the marrying of A. B. or C might be made a condition precedent. Swinb. 281.

Besides this notion of conditional restraints against marriage being *in terrorem* only, the courts had also laid it down, that unless there was a devise over, so that some other person had an interest in the performance of the condition, the condition annexed to *personal* legacies, in any manner restraining marriage was void. *Bellasis v. Ermine*, 1 Ch. ca. 22. *Semple v. Bayley*, Finch. Prec. in Ch. 562. *Pulling v. Reedy*, 1 Wilson, 21. *Wheeler v. Birgham*, 3 Atk. 365, and the other cases collected in the instructive note of Mr. Williams to *Hervey v. Aston*, in his edition of Forrester's Cases temp. Talbot, 216, and even in case of a devise over of residue, it had been held doubtful or even void. *Garret v. Pretty*, 2 Vern. 293. 2 Freem. 220. *Wheeler v. Birgham*, 3 Atk. 365. *Paget v. Haywood* cited 1 Atk. 378. *Eastland v. Reynolds*, 1 Dickens, Ch. rep. 320.

Lord Thurlow in *Scot v. Tyler*, combated the doctrine of legacies in *terrorem*, and decided that wherever the residue was devised over, it supported the condition.

The general law (civil and canon) respecting legacies in restraint of marriage, is elaborately discussed by Swinburne in his chapter on that subject, p. 282. Having made these remarks on the law as settled in *Scot v. Tyler*, I proceed to add a reference to the few subsequent cases of conditions in restraint of marriage.

Hutcheson v. Hammond, 3 Br. ch. ca. 128. *Dashwood v. Lord Bulkely*, 10 Vez. 230. *Eastland v. Reynolds*, 1 Dicken's ch. rep. 317. *Knight v. Cameron*, 14 Vez. 289.

All conditions of whatever nature, are liable to be avoided, or controuled, if they be, absurd, or impossible, or contrary to the precepts of religion, or positive law, or public safety, or public decorum, or grossly unjust.

And it will be frequently regarded as sufficiently fulfilled, if it be

substantially so, according to the intent and meaning of the contract or devise, though not formally so.

And where circumstances unavoidably prevent its being perfectly and completely fulfilled, equity will support the partial fulfillment of it, if compensation can be made for the omission of the remainder: or if the partial fulfillment of the verbal direction, be a reasonable fulfillment of the intent.

And further, where circumstances unavoidably prevent its being perfectly and completely fulfilled, equity will consider it as fulfilled, if all be done that could reasonably be expected, under the doctrine of *Cypres*, concerning which see the following cases and references. 1 Pow. Contr. 448. *Attorney General v. Guise*, 2 Vern. 266. *Attorney General v. Green*, 2 Br ch. ca. 492. *Freke v. Lord Barrington*, 3 Br. ch. ca. 281. *Routledge v. Dorril*, 2 Vez. jun. 357. *Attorney General v. Boultbee*, Ib. 380. *Bristow v. Ward*, Ib. 336. *Attorney General v. Whitchurch*, 3 Vez. 141. *Attorney General v. Boultbee*, Ib. 220. on appeal from the former case before the master of the rolls: *Attorney General v. Andrew*, Ib. 633. 645. *Attorney General v. Bowyer*, Ib. 714. *Attorney General v. Minshull*, 4 Vez. 14. *Corbyn v. French*, Ib. 418. *Brown v. Higgs*, Ib. 713. *The Bishop of Hereford v. Adams. Lady Twisden v. Adams*, 7 Vez. 324. *Andrew v. Trinity Hall, Cambridge*, 9 Vez. 525. *Attorney General v. Whiteley*, 11 Vez. 251.

The case of the *Holland Company against the intruders* on lands north and East of the Alleghany and Conewago, was also a case of Cy pres. 4 Dall. 170.

Tit. XXI. De ademptione legati, p. 172. A legacy might be revoked under the Roman law, by word, or by act. As in the latter case, if a Testator having bequeathed the debt to the Debtor, should afterward sue him: or if having bequeathed a specific article, he should afterwards sell or give it away. There was this difference between the express and tacit revocation of a legacy, that in the former case it became void, in the latter only voidable. Though the demand might be repelled by the circumstances of a tacit revocation. Ulp. in Frag. 24, § 22: and arg. ad l. 17 Dig. de adimend. legat. Dig. eod. l. 3, § ult. and l. 22.

I have already spoken of the ademption of legacies; and of the satisfaction of legacies; in the note referring to those decisions that related to satisfaction in cases of mere relations, and of strangers.

Where a devisee shall be put to his election, see Judge Wilson's edition of Bacon's abridgement, Appendix, title ELECTION.

As to the general doctrine of REVOCATION whether express or implied, it is a subject too copious to be treated of at the length it requires, in these notes. The reader may consult Swinburne 524—536: Judge Wilson's or Gwillims's Bac. Ab. under the last section of the title *Wills*, and 2 Fonbl. 357. I shall refer generally to the later cases in East, Bosanquet and Puller, Vezey, jun. Dickens, and some American cases, thinking such a reference may assist the reader's researches.

Revocations may be express, or implied, or intended so to be.

An express revocation may be compleat (a): or incompleat (b): or partial, *pro tanto* (c).

An implied revocation may be from change of state (d): so far as this relates to marriage and birth of a child by a man, or marriage by a woman, the cases have already been referred to in these notes: or it may be from acts on the part of the testator inconsistent with the bequests of his will (e): or from the testator parting with the *whole* estate, or article bequeathed (f).

The following are decisions that bear upon the class of cases (a).

Ellis v. Smith, 1 Vez. jun. 11. Dickens, 225. *Buckram v. Ingram*, 2 Vez. jun. 652. (wherein also, a legacy charged on a real estate by a will duly attested, may be revoked by an unattested instrument.) *Harrison v. Foreman*, 5 Vez. 207. *Humphrey v Taylor*, Dickens 257. *Havard v. Davis*, 2 Binney rep. 406. (a case of parol revocation). *Bates v. Holman*, 3 Hening and Munford, 502. *Cogbill v. Cogbill*, 2 Hening and Munford, 467.

Class (b). *Thomas v. Jones et al.* 2 East. 488. *Short ex dem. Gastrell v. Smith et al.* 4 East. 419. *Bowes v. Bowes*, 2 Bosanq. and Pull. 500. (a case of after purchased lands). *Maggison v. Moore*, 2 Vez. jun. 630. *Cave v. Holford*, 3 Vez. 650. *Crosbie v. Macdonal*, 4 Vez. 610. *Lord Carrington v. Payne*, 5 Vez. 633. *Ellison v. Ellison*, 6 Vez. 656. *Holder v. Howel*, 8 Vez. 97. *Pemberton v. Pemberton*, 12 Vez. 290. 310. *Dufour v. Pereira*, Dickens 419. *Boudinot v. Bradford*, 2 Dall. rep. 266. *Lawson v. Morrison*, 2 Dall. rep. 286. *Cogbill v. Cogbill*, 2 Hening and Munford, 467. *Bates v. Holman*, 3 Hen. and Munf. 502.

As to the cases (c). *Larkins v. Larkins*, 3 Bos. and Pull. 16. 109. *Earl Temple v. Dutchess of Chandos*, 3 Vez. 685. *Williams v. Owens*, 2 Vez. jun. 595. *Cave v. Holford*, 3 Vez. 680.

As to the cases (d). *Charman v. Charman*, 14 Vez. 580.

As to the cases (e). *Selwood v. Mildmay*, 3 Vez. 310. *Hinckley v. Simmons*, 4 Vez. 160. *Knollys v. Alcock*, 5 Vez. 648. 7 Vez. 558.

Baxter v. Dyer, 5 Vez. 656. (which contains also a case of marriage with birth of a child under peculiar circumstances.) *Ex pte. Lord Ilchester*, 7 Vez. 348—381. much at length. *Ex pte. Fearon*, 5 Vez. 633. *Attorney General v. Vigor*, 8 Vez. 256. *Maundrel v. Maundrel*, 9 Vez. 256. *Sparrow v. Hardcastle*, Dickens 257. *Digby v. Legard*, Ib. 500. *Peach v. Philips*, Ib. 538. *Arnold v. Arnold*, Ib. 645.

As to cases (f). *Goodtitle v. Otway*, 1 Bos. and Pull. 576. the leading case. *Doe ex dem. Dilnot v. Dilnot*, 5 Bos. and Pull. 401. *Perry v. Philips*, 1 Vez. jun. 255. (a case of after purchased lands; a possibility deviseable). *Brydges v. Duke of Chandos*, 2 Vez. jun. 417. (this is also a leading case; and includes after purchased lands, and the distinction thereon between the Civil and the English law). *Williams v. Owens*, 2 Vez. 595. *Stewart v. Titchbone*, 2 Vez. 602. *Cave v. Holford*, 3 Vez. 650. *Harmood v. Oglander*, 6 Vez. 199. 8 Vez. 106. *Ellison v. Ellison*, 6 Vez. 656. *Attorney General v. Vigor*, 8 Vez. 256. *Rose v. Cunningham*, 11 Vez. 554. *Darley v. Darley*, Dickens 397. *Mayer v. Gowland*, Ib. 563.

§ 1. *De translatione*, p. 172. A legacy is also said to be transferred when it is appointed to be paid by one heir and afterward by another. Dig. 34. 4. 6. There was some nicety depending on the form of words used in transferring bequests. Thus, I give and bequeath to *Mævius*, the legacy I before gave to *Titius*. This is a legacy transferred. Dig. 34. 4. 5. I give and bequeath to *Sempronius* the same share that I have already given to *Seius*: this is an additional legacy to the same amount, for there is no clear and positive exclusion, no undoubted specification of intention. I institute *Sempronius* as heir to the same portion wherewith I have instituted *Seius*; this is an appointment of co-heirship. Dig. 28. 5. 15. Dig. 50. 16. 142.

Tit. XXII. De lege Falcidia, p. 173. I have already noted the *Lex Furia*, and the *Lex Volconia*, which were superceded by the *Lex Falcidia*, enacted on the motion of *Falcidius*, a tribune of the people, under the sanction of Augustus, 714, A. U. C. By this law a testator was obliged to leave one fourth of his property to his heir; he could not bequeath *ultra dodrantem*, beyond nine ounces out of the twelve which made up the *As*, or whole estate. This law was, in fact, equally beneficial to testators and to heirs, because it ensured the execution of the will, by ensuring a competent reward to the heir who had the trouble. The *Lex Falcidia*, at first regarded legacies only: it was afterwards very properly extended by ampliation and legal construction to trusts: or, as some say, it was thus extended by the *Senatus consultum Pegasianum*. Trusts were certainly included within the equity

of it. By a constitution of Antonine, it was then extended to intestacies, and by Severus to donations *mortis causa*. Cod. de legat. l. 5 and 12.

§ 1. *De pluribus hæredibus*, p. 173. Suppose *Titius* and *Seius*, two heirs; *Titius's* moiety is charged with legacies nearly to the amount of the whole; and *Seius's* moiety is uncharged; and the moiety of *Titius* should, by death, dereliction or otherwise, accrue to *Seius*; he would hold it under the right of deducting from the legacies so as to leave one fourth clear. Dig. de legat. l. 78. l. 1. § 13, 14. But if the unburthened part of *Seius* should accrue to *Titius*, the legatees of *Titius's* part would be benefitted, for the Falcidian retrenchment would not take place. The reason is, that *Seius* takes the share of *Titius*, of course, with all the rights of *Titius* attached to it; he stands in the place of *Titius*. Whereas if *Titius* succeeds to the share of *Seius*, the reason of the *Lex Falcidia* fails; for *Titius* in this case, will have his fourth clear, notwithstanding the over charge of legacies on his own share. Cujas l. 4. obs. ch. 35. 36.

§ 2. *Quo tempore spectetur*, &c. p. 174. The death of the testator is the period that fixes the relative situations of the legatees and heir. If in the intervening time between the making of the will and the decease of the devisor, the estate should be encreased, the legatees are exonerated from deduction in proportion. If it hath decreased, the instituted heir may renounce. Dig. de leg. 30. 73. Cod. de caduc. tabl. 11. Dig. de legat. l. 1. § 17. l. 43. § 35. l. 22. § 3. Dig. 36. 1. 14. 5, 6.

§ 3. *Quæ detrahuntur ante Falcidiam*. p. 175. The retrenchment of legacies by the civil law was pro rata; except perhaps as in our law, as to the case of specific legacies: see Vinnius in loco, and Paulus l. 4 sentent. tit. de senat. consult. Pegasiano.

The lex Falcidia, might be made inoperative, 1st. By the express declaration of the testator, that it shall be so. Authent. sed cum testat. Cod. h. t. from novel. 1 2ly, When the heir acted without an inventory, for then it is to be presumed that he knew the Falcidian defalcation would be unnecessary 3ly, When the heir pays all the legacies with knowledge, that the Falcidian law might have been brought to bear upon them.

Tit. XXIII. De fidei commissariis hæreditatibus. p. 176. Trusts are universal or particular: *universal*, when the estate, or some given portion of it is charged: *particular*, when the heir or some legatee is charged in favour of the person to be benefitted by the trust. The present title relates to universal, the next, to particular trusts.

§ 1. *Origo fidei commissorum.* p. 176. Cod. de delat. l. 1. Dig. de legat. 1. l. 103. Dig. 284. Ulp. in frag tit. 25, § 1. Dig. 50. 16. 178. 2. *juncto Quintiliano*, lib. 3. Inst. orat. ch. 6. Justinian put legacies and trusts on the same footing. Cod. commun. de legat. l. 1 And this he was induced to do from the complexity and difficulties of the practice under the senatus consulta Trebellianum, in the reign of Nero, and Pegasianum, in the reign of Vespasian. By the first, the instituted heir being indemnified, gave up to the person to whom the trust was bequeathed, either a part or the whole of the heirship, according to the nature and extent of the trust created. So that the Prætor gave to the cestui que trust, all the actual rights and privileges of an heir, with a power to commence suits, and liability to actions in that capacity: and the instituted heir was discharged either in whole, or pro tanto according to his renunciation. He was thus released from loss, but was entitled to no recompence. Hence the senatus consultum Pegasianum was enacted, by which two points were established, 1st, the heir might act if he pleased and retain his fourth: and 2dly, if he did not choose to act, he might, on request made by his universal fidei commissary, or cestui que trust, and at his risque, be compelled to take it and perform the duties: the fidei commissary bearing all the expences. In this case the heir was not entitled to his fourth. This alteration, again brought into play the stipulations *emptæ et venditæ hæreditatis* between the heir and the fidei commissary. Dig. 15. 1. 37. Dig. 50. 16 59. 1. and also the stipulation *partis et pro parte*, where there was a partial trust of the heirship. See the Jurisconsult Paul. lib. 4. sentent. tit. 3. Ulpian in fragm. tit. 26. and the paraphrase of Theophilus on this title.

The stipulation *partis et pro parte* took place between the fidei commissary and the heir, when the latter acted under the senatus consultum Trebellianum, and took his remuneration of a fourth, or as it might happen to be. The stipulation *emptæ et venditæ hæreditatis* took place when the proceedings were under the senatus consultum Trebellianum, and the whole duties and privileges fell on the fidei commissary. These stipulations indeed were in use before the senatus consultum Trebellianum, but were brought up again by the senatus consultum Pegasianum.

Under these senatus consulta, the heir had his action of warranty against the fidei commissary *ex stipulatu*. But this occasioned so much controversy, that it gave rise to the ordinance of Justinian hereafter to be noticed under section 7 of this title.

§ 2. *De fidei commisso hæredis scripti*, p. 177. *Vel pure, vel sub con-*

ditione, &c. This might be done in case of a trust, because the heir nominally instituted, was sufficient to support the will.

Hæres instituatur. In England, the appointment of an executor, is as essential to a will, as the appointment of an heir under the Roman law A will without an executor, will render necessary an administration cum testamento annexo. Swinburne, part 4. sect. 2.

No particular form of words are required to create a trust in a will. I will, I desire, I request, &c. are imperative. See the note to *Vandycke v. Vanbeuren*, 1 Caine's N York rep. 85.

§ 4. *De senatus consulto Trebelliano*, p. 177. *Utiles actiones*, Inst. 4. 6. 16.

§ 5. *De senatus consulto Pegasiano*, p. 177.

Post quod senatus consultum ipse hæres.] The best way to explain this section, will be to transcribe a passage from the paraphrase of *Theophilus*, as it is translated by *Gul. Otto Reitz*; to whom the literary world is much obliged, for his late most complete edition of *Theophilus* in *Greek* and *Latin*, to which is added a great variety of notes by the editor and others. This edition consists of two volumes in *4to.* and was published at the *Hague*, in the year 1751. "Post hoc autem hæres solus subjacebat oneribus hæreditatis, non vero fidei-commissarius: sed denique placuit, fidei-commissarium vicem obtinere legatarii partiarii, id est, partem dimidiam accipientis Quondam enim quintum genus legati erat, dicebaturque *partitio*, et relinquebatur hoc modo: *Titius mihi hæres esto, et cum Seio hæreditatem dividito in dimidia portione.* Porro igitur hujusmodi inter eos stipulationes fiebant. Hæres legatarium sic interrogabat;—*spondes, legatarie, si ego conventus viginti aureos solvero, eorum mihi semissem dare?* et dicebat, *spondeo* Rursusque legatarius hæredem sic interrogabat;—*spondes, si ab hæreditario debitore viginti aureos acceperis, semissem mihi dare, i. e. decem?* et dicebat, *spondeo:* atque hæc stipulatio vocabatur PARTIS ET PRO PARTE. Ad exemplum igitur legatarii partiarii stipulatio procedebat hæredem inter et fidei-commissarium: et interrogabat hæres fidei-commissarium sic;——*spondes, fidei-commissarie, si quadraginta aureos poscar a creditore hæreditario, dare mihi triginta?* et hæres interrogabatur a fidei-commissario; *spondes, hæres, si a debitore hæreditario quadraginta aureos acceperis, triginta mihi dare?* et dicebat, *spondeo.* Atque hoc modo fidei-commissarius universalis vicem obtinebat legatarii: oportebatque commune esse pro rata, fidei-commissarium inter et hæredem, lucrum et damnum." *Theoph. h. t.* Harris.

§ 6. *Quibus casibus locus est senatus consulto, &c.* p. 179. See 2. Black. Comm. p. 328.

§ 7. *Pegasiani in Trebellianum, transfusio*, p. 180. Justinian having thus blended the two senatus consulta, it followed, 1st, that although the heir was required to give up to the fidei commissary an heirship burthened with trust legacies beyond the dodrans or three fourths, still the heir might retain his fourth, improperly called the *Quartum Trebellianum:* for it was the Falcidian fourth extended to trusts, not by the Trebellian, but the Pegasian senatus consultum. 2dly, All actions were divided in proportion to their shares: if the nominated or instituted heir retained his fourth, he bore one fourth of the expence: if he restored the whole heirship to the fidei commissary he bore no part. 3dly, If he refused to take upon himself the duties of the heirship, he might be compelled so to do, on being indemnified by the fidei commissary.

Quam in fidei-commissarium.] The term *cestui que trust*, used at present in our own law, seems in general to convey the meaning of the word *fidei-commissarius;* but yet not precisely: it was therefore thought most proper to anglicise it in the translation, as we have no single *English* word, adequate to the sense of it: for a *fidei-commissary*, in the *Roman* law, denotes a person, who has a beneficial interest in an estate, which for a time is committed to the faith or trust of another. Harris.

§ 10. *De fidei commissis ab intestato relictis*, p. 183. *Cum alioqui legata.* That is, according to the former law: for by the law of Justinian, Cod. 6. 43. which puts legacies and trusts on the same footing, a legacy bequeathed by codicil, or otherwise included in the present section, is good as a trust if not as a legacy.

§ 12. *De probatione fidei-commissi*, p. 183. *De calumnia juraverit* Cod. 6. 42. 32.

Tit. XXIV. De singulis rebus per fidei-commissum, p. 185. The former title, as was observed, related to universal, the present relates to particular trusts. But since the ordinance of Justinian, the distinction is not of much import.

Quamvis a legatario.] This was the ancient law; but by *Justinian's* constitution [*Cod.* 6. *t.* 43.] legacies, and gifts in trust, are allowed to come in aid of each other reciprocally: so that, to use the words of the ordinance, *omnia, quæ naturaliter insunt legatis, et fidei-commissis inhærere intelligantur; et contra, quicquid fidei committitur, hoc intelligatur esse legatum*—from which it follows, that a legatary may now be charged with the payment of a legacy. Harris.

§ 3. *De verbis fidei commissorum*, p. 186. See the above cited note to 1 Caine's N. York rep. 85. and the note to *Doe v. Aldridge*, 4 Term rep. 265.

Tit. XXV. Codicillorum origo, p. 187. Formerly codicils made before a will were void. After trusts began to be favoured, they were considered as sufficient to support a trust; if not actually repealed by a subsequent will. But when Justinian put legacies and trusts on the same footing, either the one or the other might be given by a codicil, whether before or after a will, or by an intestate. But the institution of an heir can only be by will.

Codicillorum jus.] The word *codicillus*, or codicil, is a diminutive from *codex*, a book; and denotes any unsolemn last will, in which no heir or executor is named. "Codicilli dicti sunt parvi codices; id "est, tabellæ ex codicibus aut ligno. Itaque, quemadmodum testa- "mendum *codex*, appellatur,

"*Codice* sævo

"Hæredes vetat esse suos, &c. *Juv. Sat.* 10. quia testamentum in "codicibus tantum scribebatur, sive tabulis grandioribus, ita voluntas "suprema, minus solemnis aut plena, *codicilli*, et aliquando numero "unitatis *codicillus;* propterea quod scribi solita erat in codicillis, id "est, tabulis brevioribus et tenuioribus, ita factis, ut facile, quo cui- "que commodum esset, circumferri possent. Heineccio autem judice, "*codicilli* apud veteres sunt epistolæ vel scripturæ ad alios missæ: "quia ergo codicilli plerumque perscribebantur in forma epistolarum, "hinc et nomen retinuerunt." *Vinn.*

§ 1. *Codicilli fieri possunt, vel ante, vel post*, &c. p. 188.

Non tantum testamentum.] "It is granted of all, [says *Swinburn*] "that a codicil may be made either by him, who died intestate, or by "him, who died with a testament. If the codicil is made by a per- "son, who dies intestate, the legacies therein must be paid by him, "who shall have the administration of the goods of the deceased, with "the codicil or testamentary schedule annexed. And, if a codicil is "made by him, who hath also made a regular testament, then, whether "it was made before or after the testament, it is to be reputed as part "and parcel of the testament, and it is to be performed as well as the "testament; unless, being made before the testament, it appears to be "revoked by the testament, or to be contrary to that, which is contain- "ed in the testament." *Swin.* part 1. sec. 5.

"Codicilli et ab intestato confici possunt, et facto testamento. Ab "intestato facti suis ipsis viribus nituntur et vicem testamenti exhi- "bent: proinde quicunque intestati successor erit, sive legitimus, sive

" honorarius, etiam postea natus, codicillis relicta præstabit. Testa-
" mento autem condito, codicilli, quocunque tempore facti fuerint, ad
" testamentum pertinent, viresque ex eo capiunt, etiamsi in eo confir-
" mati non sint; et infirmato testamento codicilli concidunt. Illud ve-
" ro interest inter codicillos testamento nominatim confirmatos et non
" confirmatos, quod illis relicta etiam directo jure valent, veluti lega-
" ta et libertates directo datæ; perindeque omnia habeantur, ac si in
" testamento scripta essent, excepta causa hæreditatis; at, quæ co-
" dicillis non confirmatis relicta sunt, sive verbis directis sive preca-
" riis, debentur jure fidei-commissi. Sed non est, quod de his am-
" plius dicamus; cum enim confusa nunc sit legatorum et fidei-com-
" missorum natura, dubitandum non est, quin legata, codicillis etiam
" non confirmatis data directo, nunc valeant." *Vinn.*

§ 2. *Codicillis hæreditas directo dari non potest*, p. 188.

But it can be given indirectly: as if a testator by codicil, charges his testamentary heirs to renounce in favour of the fidei-commissary of his codicil: Dig. de hered. inst. 77. Dig. de condit. instit. 10. And in one case there may be a direct substitution by codicil, as in Dig. ad senat. consult. Trebell. 76, where a direct pupillary substitution is converted into a trust *benigna interpretatione*. Heirship then, as it cannot regularly be given, cannot be taken away by codicil, which does not suffice for disinherison direct or conditional.

Codicillis autem hæreditas. Groenewegen, in his book of abrogated laws, says, that the distinctions between testaments and codicils have now ceased to be observed almost every where. *Eandem enim ordinationis solemnitatem requirunt, atque ita suprema Hollandiæ curia censuit; et confusis eorum nominibus hæredi institutionem ad substantiam testamenti necessariam esse negant pragmatici; hinc quoque codicillis hæreditatem directo dari et adimi, ideoque et exhæredationem scribi, moribus nostris nil vetat.* Groenew. de ll. abr. in Inst. 2. t. 21.

In England the appointment of an executor makes the only difference between a testament and a codicil; and this difference is little more than nominal; for whatever may be done by the one, may be also done by the other; so that a condition may be imposed, an estate may be given, or an heir disinherited, as well by codicil as by testament; and even lands may be disposed of by a codicil, if it is signed by the deceased, and attested by three witnesses in his presence, though the deceased left no testament; (for a codicil, in its true sense, denotes any testamentary schedule, and may stand singly, without relation to any other paper;) and, even where there is a testament, disposing of real estate, that testament may be altered or revoked by a codicil pro-

perly executed. And, where personal estate only is bequeathed, the same degree of proof, (and it has already been said what degree of proof is sufficient,) will establish either a testament or a codicil; and the one may revoke or confirm the other, either wholly or in part, according to its respective contents. Harris.

§ 3. *De numero et solemnitate*, p. 189.

A will, by the Roman law, is revoked by a subsequent will: a codicil is not revoked by a subsequent codicil. Hence there may be many valid codicils if they be not contradictory. A will is necessary to an heir, and an heir to a will, but it is not so with a codicil. The latter also required fewer ceremonies than a will. But a woman could not witness a codicil any more than a will.

Nullam solemnitatem. When it is said, that no solemnity is required in making a codicil, the compilers of the institutions must be understood to mean no extraordinary solemnity, as that of bringing seven witnesses to subscribe it, as in case of a testament: for it is necessary by the civil law, that a codicil should be supported by five witnesses; Cod. 6. t. 36. l. 8, which is the ordinary number required to attest several other translations. Cod. 4. t. 20. l. 28. But, in England, there is in this respect no distinction between a testament and a codicil; for either may be supported by an equal number of witnesses: ~~viz.~~ two are regularly required to a testament, and the same number is also required to a codicil; but, if either a testament or a codicil, contains a devise of a real estate, three witnesses are indispensably necessary by act of parliament. vid. 29 Car. 2. cap. 3. Harris.

Lib. III. *Titul. I. De hereditatibus, quæ ab intestato deferuntur*, p 191.

The preceding book treats of *Wills:* the present of *Intestacies;* and the order of Succession, in cases where a man dies leaving property, but no will.

The 118th Novel, which still remains a part of the law of England on this subject, in cases not otherwise decided or provided for, has altered the doctrine laid down in this book of the Institutes; so that a brief history of the changes which the Roman law has undergone on the subject of successions *ab intestato*, will be more than expedient. I am chiefly indebted for the present preliminary remarks, to those which Ferriere has prefixed to the third book of the Institutes.

By the law of the 12 tables, there were but two classes of legitimate heirs: *sui hæredes*, or proper heirs, and *agnati* or paternal heirs, the last succeeding only in default of the others.

A suus hæres, was required to be a descendant in the first degree from the intestate in a direct line, and to have been in the power of the intestate, at the time of his decease; hence the children of a deceased son who shared with the uncle, were *sui hæredes* to the uncle by representation only. § *de hereditat. quæ ab intest. defer.*

The prætors and the emperors altered the law of the twelve tables. The prætors called to the succession emancipated children *per bonorum possessionem unde liberi*, on condition that they brought into hotch-pot the property acquired during emancipation; so that the whole might be subject to an equal division among all the children of the deceased. § 9 *eod. tit.*

The imperial constitutions placed the children of deceased daughters in the rank of proper heirs, on condition that when they shared with proper heirs, they should take one third part less, and when with agnates, a fourth part less. § *ult. ibid.*

In default of proper heirs, agnates or collaterals on the male side, were called: as consanguine brothers, (born of the same father) paternal uncles and grand uncles, and their children, and other descendants of the paternal line, who had not quitted the family by any change of state.

Hence, in defect of proper heirs, the law of the twelve tables called the nearest agnate to the succession, without distinction of sex: herein observing, that there was no right of representation among agnates, but the nearest excluded all the rest; and also, that if the nearest agnate renounced, the succession did not go to the next in order, but escheated to the treasury.

The jurisprudence of the middle age, retrenched from the disposition of the 12 tables, excluding all females from the succession, except sisters, and preferring more distant males. Vid. Vinn. § 3. *de legitima agnat. success.*

As the law of the 12 tables called up the nearest agnate only, if there were none such, or he renounced, the property escheated. But the prætorian law, moderated this rigour, and in these last mentioned cases, admitted the nearest cognates *per bonorum possessionem, unde cognati:* and still further, in defect of agnates and cognates, the husband or wife surviving, succeeded to the exclusion of the treasury, *per bonorum possessionem unde vir et uxor.*

According to the above account, the father was not considered as agnate to his emancipated son; but Justinian by the last law of *Cod. de emancip. liber.* disregarded the circumstance of emancipation. Also the mother could not rank with the agnates of the son, nor the

daughter with the agnates of the mother; but the prætor admitted them reciprocally to succession *ex ordine cognatorum, puta per bonorum possessionem unde cognati.* But by the Senatus Consultum Trebellianum, a mother of several children was ranked in the first degree of agnation to her son, in default of 1st, proper heirs of the deceased: 2ndly, the father of a deceased son or daughter: 3rdly, the consanguine brother of the deceased, *i. e.* by the same father: the mother was admitted jointly with a consanguine sister, (a sister by the same father); but this underwent some changes, which will be noted.

Finally, by the Orphitian Senatus Consultum, under Marcus Aurelius, the sons and daughters of a mother, were preferred to all the agnates of the mother, without excepting even brothers born of the same fathers.

These Senatus Consulta, regarded also the claims of children born out of wedlock.

These remarks relate to the five first titles of the present Book of the Institutes.

We come next to succession in cases of Intestacy, under the 118th Novel, which establishes three degrees of legitimate succession, descendants, ascendants, and collaterals. And first of *Descendants.*

It calls to the succession all legitimate children without distinction; so that sons and daughters, grand-sons and grand-daughters exclude uncles or others in the ascending line, except as to the property acquired by the deceased for the father by virtue of the paternal power: for the usufruct granted to the father of certain property acquired by and belonging to the son, was preserved to the father. Without considering also any difference of state or quality of such children, whether under power or not at the death of the deceased; without regard to difference of sex or age, and of course neglecting all consideration of primogeniture. Without regard also, whether the descendants claimed from the male or female side, and without consideration of degree; enquiring only, whether they were in the direct line descending.

This Novel altered the former law in the following points.

1st. In making no difference, whether the deceased were under power as a *filius familias*, emancipated, or *pater familias*, at the time of his decease: under the previous law, the uncle succeeded to an intestate *filius familias*, in exclusion of the children, except in military and quasi military property; *peculium castrense et quasi castrense*; as the Institute remarks in the title *Quibus non est permissum facere testamentum:* and all adventitious property belonged by right of peculi-

um to the father of the deceased, though he left children. This Novel, cut off the claim of the uncle except as to the mere usufruct of adventitious property.

2ndly. In admitting to equal participation, male and female children without distinction: though this change, as to emancipated children, consisted in making this admission a part of the civil law instead of the prætorian law, which admitted them *per bonorum possessionem unde liberi cum onere collationis.*

3rdly. In admitting equally descendants from the intestate, whether in the male or female line; and taking away the diminution of share before required from the latter, when they were called in conjunction with proper heirs: and directing this succession to be, not *per capita*, but *per stirpes.*

As to the fourth and last point, the admission of descendants without regarding the prerogative of degree; this does not differ from the former practice respecting the legitimate succession of descendants. The right of children to represent or stand in the place of their deceased parent, having been allowed before that Novel was enacted.

As to the right of representation, which was never limited in the direct line, it may be observed,

1st, That the children of one who has renounced the succession to his father, or been disinherited, could not succeed to the uncle, who left children of the first degree, or grand-children from a child deceased: for this right of representation is derived through the father, where it is cut off. But when the uncle leaves no children or grand-children, then the nephews and neices do not succeed in right of their father, but their own. 2dly, The children of a person *civiliter mortuus* succeed to an uncle, although they share with their uncles and aunts in the succession. Dig. 1. 6. 7. 3dly, Children in the first degree succeed to equal portions.

The next chapter of the 118th Novel, relates to the succession of *Ascendants*, and embraces two cases. 1st, where fathers and mothers alone succeed to their children. 2dly, Where the deceased hath left relations in the ascending line, with brothers and sisters of the whole blood, or connected by each side; *ex utriusque parentibus conjuncti.*

As to the first case. Fathers and mothers and all ascendants, exclude all collaterals, except brothers and sisters; although such colaterals may be in a nearer degree: partly in consideration that they gave existence to the deceased; partly from considerations of natural reverence *(pietatis intuitu)*; and partly as some consolation for the loss. The paternal ascendants were preferred by the Trebellian

senatus consult; but by this Novel, ascendants on the one side and the other were equally admitted. If there was a father only, or a mother only, such would succeed in exclusion of an ascendant in a more distant degree. Also, if there were no fathers or mothers, but several ascendants in equal degree, the property was not therefore always equally divided between them: but one half was given to the ascendants being representatives of the father, whatever their number, and the other half to the ascendants representing the mother. For had father and mother been living, they would have succeeded equally. Thus an uncle on the father's side, will take as much as an uncle and an aunt together on the maternal side.

Hence where succession is regulated by this chapter of the Novel, no distinction is made between property that came by the father's side or by the mother's: and the rule *paterna paternis, materna maternis* does not hold: but a maternal uncle will succeed to property descended from or bestowed by the father, equally with an uncle on the paternal side.

Nor is difference of sex regarded under this rule of succession.

As to the second case under this second chapter, where ascendant relations concur with brothers and sisters of the whole blood, they succeed with them per capita: and it is only brothers and sisters thus doubly connected, on each side, that do partake with near ascendants, *exceptis inquit Justinianus solis fratribus ex utroque parente conjunctis.* The father in this case acquiring his own portion in full right, cannot claim the usufruct of his children's portion. But when there is no father or mother, brothers and sisters do not exclude uncles or aunts or other ascendants in default of uncles and aunts, but concur with, or partake in the succession with them, per capita.

Suppose three brothers of the deceased; an uncle and aunt on the paternal side; and an uncle on the maternal side; each brother will have a sixth; the paternal uncle and aunt a sixth and a half between them, and the ascendants the other half between them.

Ascendants a second or third degree distant, exclude brothers and sisters connected on one side only, or the half blood. This is a conclusion from the passage of the text *si vero cum ascendentibus inveniuntur fratres et sorores ex utriusque parentibus conjunctis* (of the whole blood) *cum proximis gradu ascendentibus vocabantur.* Of course, if these only are called, the half blood are not called.

According to this second chapter of the 118th Novel, nephews of the whole blood, do not partake with ascendants, when the father of the deceased is dead, although there should be brothers of the whole

blood. This however was changed by the first chapter of the 127th Novel, which enacted that when there were brothers of the whole blood, the nephews of the whole blood might be admitted to concur with such brothers and with ascendants. But as they come in only as representing their father, they take not *per capita* but *per stirpes*; and succeed to that portion only which their father would have claimed, if he had been alive.

As to the third chapter of the 118th Novel on the succession of *Collaterals*.

1st, If the deceased leave neither descendants nor ascendants, the succession falls to his brothers and sisters of the whole blood, in exclusion of the half blood. See Nov. 84. But in case of brothers and sisters of the half blood only, they are admitted to equal shares.

2ly, Nephews of the whole blood succeed with their own uncles and aunts of the whole blood *(germani:)* but by stock only *per stirpes:* for they succeed solely as representatives of their parent.

3dly, Nephews of the whole blood, exclude those of the half blood, as a brother of the whole blood would exclude nephews and nieces of the half blood.

4thly, Nephews exclude uncles and aunts of the deceased, though each are in the third degree. *Filii fratrum in hoc casu representationis jure finguntur esse in gradu secundo, et sic patruos excludunt.* On the principle also, that collateral descending, should be preferred to collateral ascending relations; *quia hereditas naturaliter descendit potius quam ascendit.*

5thly, If the deceased left neither brothers or sisters, nephews or neices, the other collateral relations are admitted in the order and degree of their relationship, without regard to sex The ancient difference between agnation and cognation in this respect being abrogated by the 4th chap. of this Novel.

The right of representation granted by this third chapter of the 118th Novel to nephews and neices, and to no other collaterals, takes place in the three following cases only.

1st, When nephews and neices concur or share with a brother or sister of their deceased uncle or aunt: in this case they succeed *per stirpes.* The former law admitted a right of representation among collaterals, in no case. See § 4 *of Instit. de legitim. agnat. success.* This being in fact a new law, was construed strictly. Hence, when nephews of different brothers and sisters succeeded to their uncle or aunt who had left neither brother or sister, the division was made *per capita*, and not *per stirpes.*

And as it is usually held, representation does not take place in the collateral line, unless in favour of the children of brothers and sisters, when they share in the succession with their uncle or aunt, the brother and sister of the deceased.

2dly, Representation takes place when the nephews of the whole blood, are preferred to brothers and sisters of the half blood: which could not take place but by representation; for a nephew is in the third degree, and brothers and sisters in the second.

3dly, When there is an uncle and a nephew of the deceased. Hence by the 3rd chap. of the 118th Novel, Justinian would have the nephew exclude the uncle, which could only be done under the privilege of representation, which brings the nephew a degree nearer than the great uncle, who is but uncle to the deceased. This also is an innovation on the former law.

The preference of the whole blood, is a privilege accorded by this Novel, to certain collateral relations, and no doubt a reasonable one. *Duplex enim vinculum quod est in fratre germano fortius est unico illo quod intercedit inter fratres consanguineos aut uterinos.* The fourth chapter takes away the distinction between *agnates* and *cognates*. When an unmarried person dies without relations ascending, descending, or collateral, his property escheats to the public treasury. But a legitimate unbroken marriage, protects the succession to the survivor. This privilege of the Exchequer or public treasury proceeds from the want of an heir, Cod. 10. 10. 1. 4. Creditors in this case have a lien on the property. Dig. 49. 14. 11. If the deceased died a member of any lawful company or college, that shall succeed before the exchequer. Cod. 6. 62. t.

Succession being not a natural but a civil right, varies in almost every country. The rule *paterna paternis, materna maternis*, was adopted in France, Loix civiles. Tom. 3 præf. § 4. and in England 1 Co. Litt. 13. a.

So in England, the whole blood universally excludes the half blood, and succession ascending by right line takes place in no instance. It is of little consequence what regulations society adopts on this subject, provided they be clear, and of easy application. The variations in England dependant upon feudal principles whose reason has long ago ceased to operate—and upon the right of primogeniture which, in this country, we have discarded, still gives a perceptible tinge to much of the law of descent and succession on this continent. Though it must be allowed that the statute of distributions of this state, is founded as much on principles of natural equity, as can reasonably be expected.

For common cases, the state of Pennsylvania has made as fair and judicious a will, as men usually make for themselves.

The 118th Novel will be found at the end of the text, and I shall insert at the close of this note, a translation of those sections of it, that bear immediately on the present subject.

In the mean time, however, I am strongly tempted to insert the following entertaining and useful remarks of Dr. Taylor (Civ. Law, p. 537.) on the subject of succession ab intestato: an author, who, though he may be desultory and immethodical, as Gibbon complains he is, presents his reader notwithstanding, with notes of great learning, great taste, and great instruction.

"The succession into the estates of intestates is one of the most uncertain points of law. I call it uncertain, 1st, because there are not found perhaps two nations upon earth, that have fixed upon the same method of conveyance: and 2dly, because there is scarce one, but what has at some time or other differed even from itself. With the Romans particularly, the distribution, which prevailed for some time, took a different turn, even while the Emperor was compiling his Body of Law, and the system of the *Novels* (the CXVIIIth particularly) entirely defeats the doctrine laid down in several titles of the third Book of the *Institutes*, where that matter was considered, and meant to be established. With the Novels it settled.

To contemplate therefore this question, the stream of nature conducts us first to view succession in the order of

Descendants. This was the natural course, and the general direction of Providence. And be it observed, that Natural Law is said by some to be interested no farther, than in the succession of those, who claim from under us: and that Ascendants and Collaterals are called in by Civil Law. Which yet by others is denied, and, I think, with sufficient reason However the primary distribution of nature is very apparent.

Cum Ratio Naturalis, quasi Lex quaedam tacita, liberis parentium hereditatem addiceret velut ad debitam successionem eos vocando, propter quod et in Jure Civili suorum heredum nomen eis inductum est, ac ne judicio parentis, nisi meritis de causis summoveri ab ea successione possunt. D. 48. 20. 7.

The great rule of succession among the Romans, in the method which lyes before us, *viz.* the succession of descendants, is comprised in these few reflexions; *That* (1) descendants, while they last, exclude all other relations whatsoever: *That* (2) there is no respect had to primogeniture, and (3) no preference in regard to sex: *That* there

is (4) no exclusion of any ever so remote degree: and lastly (5) *That* the estate of the intestate makes so many *general* shares, as there are distinct heads in his *immediate* descendants.

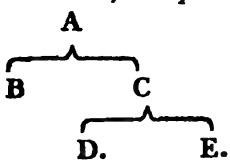
I. For, as this downward direction was the primary and principal recommendation of natural law, it followed, that inheritances could never revert, or be thrown *upwards (inter Ascendentes)*, nor be turned *aside (inter Collaterales)*, as long as any were to be found in the line *below*, or that of descendants, *in infinitum*. For the principle, upon which this succession rested, was the *Jus Repraesentationis*, which can not be fairly or reasonably imagined in any other line than in that, to which we give existence. There is something of *successive* in the idea of representation, something which looks like keeping up an order or a series; and though to brothers it may be applied in some sense, to fathers and grandfathers it can be applied in little or none.

II. III. The second and third particulars, *viz.* the disregard of sex and primogeniture, in which these people differed from most others, as well before, as after them, are of that arbitrary consideration, that little remains to be observed upon that disposition. But natural equity has a great stroke in the two last, and calls for some regard:

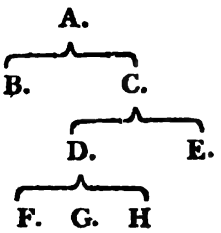
IV. V. That descendants of the second, third or fourth degree, should be raised to a kind of level with those of the first, and not stand excluded, even while some of the first remain: That children of a remote descent should inherit *along* with the immediate one (I suppose the way cleared before them) is agreeable to truth and justice. The grandchildren *etc.* of *Sempronius* by a son that is gone, stand to *Sempronius* in the place of that son. They would have had their shares *through* that father, if he had lived; and represent him therefore, or succeed to his rights, now he is removed.

And hence, because *many* children may succeed into *one* father's rights, it follows, that the *Jus Repraesentationis*, which transmits the estate of *Sempronius* to his immediate descendants, shall undergo a considerable alteration in those descents or generations that follow after. Though *Sempronius* may be represented by any number of children indifferently and cut into so many shares accordingly, yet will each of those children be represented by their whole families; not by so many distinct *heads* of children, as *Sempronius* was, but by all their children collectively (let their number be what it will) laying, as it were, their heads together to form one common *stock*. For all those grandchildren *gregatim*, have that right in common, not separate to

each, which their father had to *himself*. And this is called *successio in stirpes*: the other when all share alike, in *Capita*. Thus in the scheme,



The estate of *Sempronius* A will be divided into two equal parts, and B and C will each be heirs *ex semisse*. But supposing that C is gone before his father, then shall B still be *heres ex semisse*, and D and E *ex quadrante*, each. Or put the case



that C and D should both be gone, and D be represented by F G and H then will B as before be *heres ex semisse*, E *ex quadrante*, and F O and H will succeed each of them *ex uncia*. Or put the case, that E is dead, without issue also, then will F, G, and H, be each of them *heres ex sextante*

But, taking leave of descendants, supposing that *Sempronius* dies intestate, without heirs of his body, we are then directed to the consideration of

Ascendants, Though this may be against natural order, it is not against natural affection. And I think therefore that doctrine is not to be admitted, which maintains, that parents had no right to the goods of their children, dying childless and intestate, unless they had been relieved by the civil law. We have seen what title the indigent father has to a maintenance, and the same way of reasoning will serve in the one case as well as the other. See Gothofred. ad Nov. 1 Praef. § 2.

And when St. *Paul* said, 2 Cor. XII. 14. *The children ought not to lay up for the parents, but the parents for the children*, it is spoken with a view to the ordinary course of providence. It is the rule, without regard to the exception.

But I observed, that this is up the stream, and against the common order of succession. And the ancients always gave it that melancholy consideration. We find it a constant matter of complaint in their funeral sorrows, when such calamities befell them. *Turbato ordine mor-*

talitatis—parentes filio contra ordinem—et quod miserrimum est mater fecit filiae—ordine retrogado defuncto—parentes male iudicantibus fatis supertites—memoriam posuerunt contra votum—quod filius patri facere debuerat ipse fecit—aequivs enim fuerat vos hoc mihi fecisse—quae prior debui mori DCLXXXVI. 9—are the common expressions upon this occasion.

To give these considerations some little attention:

This is the language of the Poet Ovid. 1. Heroid. 101.

Di precor hoc jubeant, ut, euntibus ordine fatis,
Ille meos oculos comprimat, ille tuos.

And of the lawyer also: D. 5 2. 15. pr.

Nam etsi parentibus non debetur filiorum hereditas, propter votum parentium, et naturalem erga filios caritatem, turbato *tamen* ordine mortalitatis, *non minus parentibus, quam liberis pie relinqui debet.*

Thus the inscriptions:

ANTONIUS SEVERUS AQUILA HIC JACET
SINE ANIMA MISERABILI FATO QUI VIXIT
ANNOS BISSENOS ET SEX MENSES CUI VOTA
ERANT UT PARENTIBUS ISTA PARARET
SET MORS IMMATURA FECIT UT FACERENT
PARENTES FILIO CONTRA ORDINEM.
Gruter. DCLXIX. 4.

Another remarkable expression is *contra votum,* as we have just seen from *Papinian* D. 5. 2. 15. pr. Add. 29. 4. 26. 1.—38. 6. 7. 1.—38. 2. 50. 2. And so the inscriptions run.

MOTARIAE P. F. PIISS.
MASCELLIO F. FELIX ET
TUTATIA CRISPINA
FILIO DULCISSIMO
MEMORIAM POSUERUNT
CONTRA VOTUM. Gruter. DCXCVI. 10.

Thus we read in *Plutarch* in Vita Catonis Maj.

Η τουτου μητηρ ΚΑΤΑΡΑΝ, ου ΕΥΧΗΝ ηγησατο το τουτον υπερ λυσης απολιπειν

Hujus Mater, exsecrationem, *non* votum, *duxit, ipsum superstitem relinquere.*

And it is not to be doubted, but that, from this strain of affection, and this parental SUPERSTITION, that very word has gained its signification:

Qui totos dies precabantur, et immolabant, ut sui sibi liberi superstites essent, superstitiosi sunt appellati, quod nomen postea latius patuit Cic. II. de N. D. 28.

L. SPERATI DESIDERATI ADULESCEN
TIS SPEI ET PIETATIS INCOMPARABI
LIS SPERATI HERMODORUS ET IVLIA
NA PATRES MALE INDICANTIBUS
FATIS SUPERSTITES POSUERUNT. Gruter. DCCVII. 5.

Non est ignotum, qualem te in personam patris tui gesseris: quem non minus quam liberos dilexisti: excepto eo, quod non optabas superstitem Senec. de Consolat. ad Marciam. init.

Plautus begins his *Asinaria* with a memorable passage:

Sicut tuum vis unicum gnatum tuae
Superesse *vitae, sospitem et* superstitem!
Ita te obtestor, per senectutem tuam.
Perque illam, quam tu metuis, uxorem tuam.
Siquid med erga tu hodie falsum dixeris,
Ut tibi superstes uxor aetatem siet,
Atque illa viva vivus ut pestem oppetas.

The *Superstition* in this passage, between the case of the son, and of the wife, is considerably different.

And lastly, this leads me to recommend a new word to the Lexicons, (I do not recommend the age of it):

M. L. FLORUS M. FL. F. M. L. FL. PRONEPOS INFELI
CISS. PARENS AFFLICTUS PRAEPOSTERITAE
NAT. HV. FILIUM VN. H. COND. QUEM IMPORTUNA
MORS ADEMIT PRAEREPSITQUE SENII BACULUM
CUI JAM DEFESSA AETAS ADNITENS PERBREVES
ANNOS SS. ALLEVABAT. HUNC. ANTE MORS ADSE-
QUITUR
QUAM TRISTES LACHRIMAE DESERVERINT
NOTA POST. Gruter DCLXXXIV. 6.

Praeposteritas is a very uncommon expression, and I believe a barbarous one. But the idea it represents, is very suitable to our subject.

It is upon all these accounts, that the succession of the parent into the estate of the child is always attended with these unfavorable expressions, *Luctuosa Hereditas*, C. 6. 25. 9. *Luctuosa Portio*, C. 3. 28. 28. *Triste Lucrum*, C. 6. 59. 11. *Durae Fortunae solatium*, C. 6. 56. 4. *Tristis Successio*, Inst. 3. 3. 2. And it was imagined by lawyers to pass *in Orbitatis solatium*. There is a law often quoted upon this occasion:

Non sic Parentibus Liberorum, ut Liberis Parentium debetur Hereditas: Parentes ad bona liberorum Ratio miserationis *admittit, liberos naturae simul et parentium commune votum.* D. 38. 6. 7. 1.

To settle therefore the rule of successions in *Linea Ascendente*, there are two cases to be supposed possible,

I. Either there are no collaterals besides, II. or there are.

I. If there are no collaterals, then the succession of the intestate's estate, dying, as we suppose, childless, reverts in that melancholy order, we have been just observing, and falls to his father and mother, or to either of them surviving, to the exclusion of every body above.

For it must be observed, that here is no *Jus Repraesentationis*; which I observed followed the order of nature and of blood, and is constantly imagined downwards. Therefore, contrary to what was found to be the rule in descendants, here every nearer degree excludes the remoter, and even the mother shall exclude the grandfather.

II. But if we suppose collaterals to be left along with ascendants, the succession shall be divided. And put the case, that there is left a father and mother, a brother and sister, all the four shall succeed in equal portions. However, some caution is necessary to be observed, and these rules are not to be forgotten:

(1). Collaterals never can exclude ascendants, even in the remotest degree. For the preference is with the ascendants; and collaterals can only share, not exclude.

(2). The collaterals that share with ascendants must be brothers, or brothers children at farthest. No one can be admitted to a dividend beyond that degree. For, as before, the preference is properly with the ascendants; brothers were not called in till late in law, *viz.* by the CXVIIIth Novel, and brothers children still later, *viz.* by the CXXVIIth.

(3) The succession of ascendants alone, of ascendants joined with brothers and sisters of the whole blood (for the half blood is excluded) is, as was observed, in *Capita:* but the succession of brothers and sisters children, in concurrence, is *in Stirpes*, because they represent their *parent*, and *many* may represent *one*.

The last consideration regards *Collaterals*. And here we suppose, that no one is left either in the ascending or descending line whatever. I can imagine

1. Brothers and sisters alone.
2. Brothers and sisters together with brothers and sisters children.
3. Brothers and sisters children alone.

1. Brothers and sisters alone of, the whole blood, succeed *in Capita*, to the exclusion of the half blood.

2. Brothers and sisters children, concurring with brothers and sisters, succeed *in Stirpes*.

3. Nephews alone succeed *in Capita*, *non in Stirpes:* for they succeed (now) in their own right, and not by representation.

The half-blood succeeds for want of the whole blood, regularly and uniformly, in the manner of the whole blood. And because the half-blood is called into the succession in failure of the whole, it will follow, that a nephew of the half-blood shall exclude an uncle of the whole. Because the uncle's right only commences, when representation ceases.

In a concurrence of half-blood, *viz.* when brothers, *etc.* by the father's side succeed along with brothers by the mother's side, the rule of law is, that they succeed separately into the goods of the separate sides: and into the common goods in common.

If none of these are given, then the next relation indifferently, succeeds in order of proximity. For the *Jus Repraesentationis* is specific, not general: it is extended to brother's children, but goes no farther. Thus the uncle of the intestate would be excluded by the nephew, because the nephew by this right of representation is, as it were, in the entail: But the uncle of the intestate would not be excluded by a son of that nephew. For the right of representation being now stopt, the uncle is nearer in degree, than the brother's grandson.

If there be two next kindred of equal degree, they are equally entitled to the succession, whether on the father's side, or on the mother's and succeed *in capita*.

These are the general principles of *Justinian's* last regulation upon this head. But in many of these distributions which stand so far removed from natural right: where the stream of blood must run but cool, and languid: where it is impossible to balance the affection towards one relation, with the affection towards another, by principles of nature; there, human invention has insinuated its assistance, and that is one great reason of what I observed above, *viz.* that no two nations can ever be found that agree in these delicate circumstances.

In the English law again, a great deal depends upon the distinction into real and personal estates, which the Roman law knew nothing of. This was agreeable to the genius of our ancestors, who distributed their lands in fee, and expected some emolument in return. As the Saxons therefore were perpetually loading descents with services, and of consequence were led to direct those descents where those services were likely to be maintained with the greatest vigor and advantage; This, I say, is the fairest reason, and looks likely to be the true one, why the father cannot succeed (in this kingdom) into the landed estate of his son. Because he cannot be supposed in a condition to perform the service that is expected from it. It was one reason given in the feudal law, for the exclusion of daughters, *Quia Filiae servitia praestare non possunt.*

I have here exhibited what I professed, viz. an account how this distribution stood by civil law: I am sensible it deserves a fuller consideration, and it might be useful, to bring it into comparison with the distribution of other states, who have laid themselves out upon the equity of assigning the order of successions: In which some have been pretty successful. But of this hereafter; if that hereafter should ever come, when I shall be called upon to improve these *elements* into a system, and these *institutes* into a digest. Taylor.

NOVEL 118th.

PREFACE: Declaring the provisions of former laws on this subject, consolidated and re-enacted in the present Novel, under the heads of the succession of relations in the *descending* line; the succession of relations in the *ascending* line; and the succession of *collateral* relations.

CHAP. 1. Of the succession of *descendants*.

Every relation of a deceased person in the (right) line descending, of whatever sex or degree, whether related by the father's or by the mother's side, whether under power or free, is preferred to every relation in the ascending line, or collateral. Although the deceased were himself under power, yet his children, of whatever sex or degree, shall be preferred to the parent under whose power the deceased was, in respect of that property which, by our laws, was not acquired for the parent. For the usufruct of such property we reserve to the parent; but with this proviso, that if any such descendant should die leaving children, such children or other descendant shall succeed in place of their proper parent, whether they be under power of the deceased at the time of his death, or not; taking in such case, that portion of the property of the deceased intestate, which their own parent would have been entitled to, had he been living; which succession our predecessors have denominated *per stirpes*, or by stock. (§ 6. Inst. de heredit. ab intestato. 2 Gaius 8. § 7. Cod. de suis. l. 2.) In this order of succession we make no enquiry as to the degree, but call up grand-children generally to the succession concurrently with the sons and daughters of a son or a daughter previously deceased; and this without consideration of sex, or whether they sprang from the paternal or maternal side, whether they be free (*sui juris*) or still under power. Thus we have enacted as to descendants, and we now proceed to ascendants. (N. B. By throwing aside all considerations whether the claimants in succession sprang from the male or female side, the old law was changed. Nov. 18. 4. ult—Cod. de suis. 9. 13. which is thus repealed, Inst. de heredit. ab intest. § 4.—Cod. Theod. de legit. hered.

CHAP. 2. Of the succession of *ascendants*.

If the deceased hath left no descendants, his father or mother, or any other surviving relatives, in the right line ascending, shall succeed in preference to all collaterals, except brothers of the whole blood, as shall be noted presently. If there be many ascendants, let the nearest in degree be preferred, whether male or female, whether descended from the paternal or maternal line. If there be many in the same degree, let the inheritance be equally divided between them, so as that the heirs on the paternal side, however numerous, shall receive the one half, and those on the maternal side the other half. Should there be brothers and sisters of the deceased living, connected with him by descent from both parents,* as well as ascendant relations, let them be concurrently called to the succession. If the ascendants, should be father or mother, let the inheritance be divided between them and brothers (and sisters) that each shall have an equal part. Nor shall the parent claim an usufruct of the portion assigned to the brothers and sisters,† for in lieu thereof we have by the present law assigned him his own share of the succession in full property. No distinction is to be made between persons thus called to the inheritance, whether they be male or female, or connected with the deceased by the father's or the mother's side; or whether the deceased were sui juris or under power when he died. We proceed therefore to the consideration of collateral succession, which relates either to agnates or cognates.

CHAP. 3. On the succession of collaterals. If therefore the deceased hath left neither descendant or ascendant relations, we first call to the inheritance brothers and sisters born of the same father and the same mother, (i. e. of the whole blood,) whom we before called in concurrence with the parent.

If brothers and sisters of the whole blood be wanting, we call in brothers (and sisters) of the half blood, whether on the father's side or the mother's side.

But if the deceased left brothers, and also the children of a deceased brother or sister, these last will be called to the inheritance concurrently with their uncle or aunt of the whole blood, and will be entitled

---

* αμφιθαλεις αδελφοι brothers of the whole blood: *germani.* ομοπατριοι by the same father; *consanguinei* (and sometimes improperly *germani.*) ομομητριοι by the same mother, *uterini.*

† This repeals Cod. de legitim. heredit. l. 13. and Cod. com. succes. l. ult. in fin.

to the same portion whatever it be, that their parent would have been entitled to if alive.

Hence, if a brother be dead, leaving children, and he was of the whole blood, while the living brothers may be of the half blood only, those children are preferred to their uncles, although they are in the third degree; and this whether the surviving uncles (or aunts) be connected in relationship with the deceased, by the father's side, or the mother's side; in like manner as their parent if living would have been preferred. Contrariwise, if the living brother be of the whole blood to the deceased, and the dead brother be a half brother only, the children of the latter are excluded, as their parent also would have been if alive. For the privilege of representation thus given, is conceded only to this class of relations, and extended no farther, than that *the children of the deceased brothers or sisters*, may succeed to that which their parent if living would have been entitled to. We confer this benefit on the children of brothers, when brought into consideration with their own uncles and aunts, whether of the paternal or maternal side.

If surviving relations in the ascending line should be called to the inheritance conjointly with brothers and sisters of the deceased, in that case we do not permit the children of a deceased brother or sister to be called in, even although their parent was of the whole blood.

Whenever, therefore this privilege of representation is given to the children of a (deceased) brother or sister, that they should succeed in the place of their parent, and being in the third degree should be called concurrently with those who are in the second degree, it is manifestly for this reason, because they are preferred to uncles or aunts of the deceased, whether paternal or maternal, who also count no higher than the third degree.

If the deceased hath left neither brothers, nor the children of a brother, collaterals are called to the inheritance according to the respective degrees they occupy, the nearest in degree being preferred to the more remote. If many persons be found related in the same degree, let the inheritance be divided equally between them according to their number, which our laws denominate, a division *per capita*.

Chap. 4. Takes away the distinction between agnates and cognates.

Chap. 5. Relates to the legitimate tutelage of children.

Chap. 6. On the authority of this law.

Alterations made by the 127th Novel.

We never regret any alteration in our laws, that may be of benefit to our subjects. We remember to have enacted (by the 118th Novel) that if a deceased person left brothers alive, and also children of a bro-

ther who died before him, those children should be called to the inheritance equally with their uncles, filling the place of their father, and entitled to his portion. But that if the deceased left any relations in the (right or direct) ascending line, together with brothers of the whole blood, and also children of a brother previously deceased, we directed the brothers of the deceased to be called to the inheritance concurrently with the surviving relations in the (right) line ascending, and excluded the dead brother's children.

Chap. 1st, For the purpose of correcting this, we enact, that if a deceased person shall leave a living relation in the (right) ascending line, and brothers also who may be called concurrently with such relation, and children also of a brother previously deceased, the latter shall be called in, concurrently with the rest, and succeed to the portion that their own parent, if alive, would have been entitled to. This we decree in respect of the children of a previously deceased brother of the whole blood: directing that they shall occupy the same rank, whether called concurrently with their uncles only, or with their uncles concurrently with a parent of the deceased in the ascending line.

The rest of the Novel does not relate to this subject.

Lib. III. *Titul. 1. Definitio intestati*, p. 191. Heirship is the succession to the universal right of the deceased. Dig. 50. 62. A testamentary heirship takes effect presently on the death of the testator; a legitimate or lawful heirship, (cast by operation of law) takes place so soon as it is ascertained that the deceased died intestate.

An heir under the Roman law, is properly likened to an executor under our law, but executors separate from heirs were also known under the later periods of the civil law, and their history is slightly but well touched by Dr. Brown. 1 Civ. Law. 310.

§ 1. *Primus ordo succedentium*, &c. p. 191. This law of the twelve tables is not extant.

§ 2. *Qui sunt sui hæredes*, p. 191. *Naturalis sint.* Natural children, do not, in the expressions of the Roman law, mean bastards, but the actual children by procreation of the person spoken of, in contradistinction to *adopted* children. Cod. de natur. lib. l. l. 10. 11. Natural or illegitimate children, in the English sense of the word, could not be proper heirs, *quia pater eorum incertus est*, and *pater est quem justæ nuptiæ demonstrant.*

Illegitimate children, born of a concubine, not of promiscuous copulation, or of adulterous or incestuous commerce, might, under the twelve tables, be instituted heirs by the will of the father to whatever portion he thought fit: this was afterwards restrained to cases where

no lawful wife or legitimate children were left, and confined to a sixteenth of the whole estate, between the mother and the children. Arcadius and Honorius, directed that where a deceased left a wife and legitimate children, he could not dispose by will of more than one ounce among his illegitimate children, or a twelfth of the *As*, or whole estate: but if the lawful wife and children were dead, he might bequeath one fourth of the whole among the concubine and her children by him. But this also, was altered by Justinian. Ferriere.

§ 3. *Quomodo sui hæredes fiunt*, p. 193.

A morte parentum] Persons are said to be *sui hæredes*, or proper heirs, *quod non alienarum sed suarum, sive propriarum, quodammodo rerum hæredes esse videantur*; i. e. because they seem to be the heirs of their own property, and not the heirs of another's: for a proper heir is, in the life time of his parent, the co-heir or partner with that parent in his possessions: so that a son, who is a proper heir, does not acquire a new property at the death of his father, but only possesses in a fuller manner what was before vested in him. *Vinny, h. t.* Harris.

Hence, *sui hæredes* are seized ipso jure on the decease of the parent, and if they die before they act, their rights are transmitted to their own heirs; whereas in other cases the rule is, that *hereditas nondum adita non transmittitur*. They were also, not only proper heirs *sui*, but necessary heirs, *hæredes necessarii*; for they became so of course, without any previous consent of their own. See Instit. lib. 2. tit. 19. § 2. together with Dig. 28. 5. and Dig. 29. 2.

An heir who has once acted in that capacity, becomes always liable after that to the creditors of the estate. Dig. 28. 5. 88.

§ 4. *De filio post mortem patris, ab hostibus reverso*, p. 193. As to the *Jus Postliminii*, see lib. 1. of the instit. tit. 12. parag. 5. Dig. 49. 15. De captivis et Postliminio at length. 2 Dall. rep. 4. *Miller, libellant v. Miller. Wade v. Barnewell*, 2 Bays S. Car. rep. 229. 1 Brown's civil and admiralty law, 127. and 2 Ib. 266. under the title recapture and salvage, to which the modern cases of postliminy principally apply. See also the head of *Jus postliminii* in Grotius, book 3. ch. 9. and in Vattel. But particularly in *Mr. Du Ponceau's* valuable translation of Bynkershock's treatise on the law of war, with the notes 36—44. and 113—122. *Postliminium fingit eum qui captus est, in civitate semper fuisse* Instit. ub. sup. *Jus quo perinde omnia restituuntur jura, de si captus ab hostibus non esset.* Dig. ub. sup.

§ 6. *De divisione hereditatis inter suos hæredes*, p. 194.

Dem ex duobus filiis.] By the civil law, representation takes place *in infinitum* in the right line descending; and therefore it follows, ac-

cording to that law, that, when any person dies, leaving grand-children by sons or daughters, who died in his life-time, such grand-children, though equal in degree and unequal in their number in regard to their respective stocks, will divide the estate of their grand-father *per stirpes*, *i. e.* according to their stocks: for example, if *A* die worth nine hundred *aurei*, and intestate, leaving only grand-children by three sons, already dead, to wit, three grand-children by one son, five by another, and six by another, then each of these classes of grand-children would be intitled to a third; that is, to three hundred *aurei*, no regard being paid to that class, in which there were most persons. *In hoc casu*, (says *Vinnius*,) *maxime conspicua est vis repræsentationis; licet enim omnes hic pari gradu sint, ut proprio singuli jure succedere posse videantur, tamen postquam semel placuit, nepotes in locum patris sui demortui, aliave ratione exuti jure sui hæredis, succedere, non debuit hoc jus ex accidenti aliquo variari, puta ut soli nepotes ex diversis filiis et numero inæquales, ceu pauciores cum pluribus ex hac vel illa stirpe concurrentes, in capita hæreditatem dividerent.* Cod. 6. t. 55. l. 2. *Quæ sic in universum recte definiemus, descendentes ex masculis omnes, quidem diversarum stirpium, quantumvis ejusdem omnes gradus, in stirpes non in capita, succedere.* But, in *England*, although representation may thus be said to extend *in infinitum* in the right line descending, yet this apprehend must be understood to be in those cases only, where representation is absolutely *necessary* to prevent the exclusion of grand-children, great-grand-children, &c. For example therefore, if *Titius* dies leaving a son, and *D*, *E*, *F*, his grand-children by another son, who died before *Titius*, then the surviving son would take one moiety, and the grand-children *D*, *E*, *F*, would take the other, as the representatives of their deceased father: for in this case representation would be necessary; because, if representation was not allowed, the grand-children of *Titius*, being in a more remote degree, than his son, would be totally excluded; which would be highly unjust. But, if *Titius* dies and leaves only grand-children by two sons, already dead; *e. g.* three grand-children by one son, and six by the other, then representation would not only not be necessary, (as all the persons are in the same degree, so that none of them can be excluded;) but it would occasion a very unequal distribution of the effects; namely, of only half the intestate to six of the grand-children, and of half to the other three, which does not seem agreeable either to the sense, or even the words of the statute. See 22, 23, *Car.* 2, *cap.* 10. Harris.

This section in some editions of the institutes is entitled *Quæstus eui hæredes succedunt.*

§ 8. *De nato post mortem avi, &c.* p. 195.

Plane si et conceptus et natus.] "Sunt, qui velint hunc nepotem, et-"si ad hæreditatem avi jure suo non veniat, posse nihilominus jure "paterno eam adipisci: etenim certum est, liberos parentum hæredi-"tatem, quantumvis non acquisitam, ad liberos suos transmittere." *Cod.* 6. *t.* 51. *l.* 1. *sect.* 5. *Cod.* 6. *t.* 52. *l.* 1. "Filius porro in proposi-"ta facti specie, si adhuc viveret, posset patris hæreditatem acqui-"rere; sibagitur ad filium suum posthumum, etsi post avi mortem "conceptum, hæreditatem ejus transmittere posse putant. *Pileus* ne-"poti huic, per Novellam 118, succursum esse censet, ut suo jure avo "succedere possit; et hoc quidem suadet æquitas; sed non favent sa-"tis perspicue verba legum." *Doujacius.* Harris.

Dig. 1. 5. 7. and 26. Dig. 38. 16. 7 and 8.

§ 9. *De liberis emancipatis*, p. 196. It may be remarked that the prætorian bonorum-possessio, is not synonimous with possessio bonorum. The latter consists of *two* words, and means the actual possession of goods, the former is *one* word, and means an order of court conveying the *right* of possession of the goods to the person in whose favour it is issued. Dig. 37. 1. 3. 1.

§ 10. *Si emancipatus se dederit in adoptionem*, p. 196. Dig. 38. 8. 4.

Ad liberos, an ad agnatos.] For the arrogator, by retaining under his power the emancipated son of the deceased, might make room for the *agnati* of the deceased; or, by emancipating his arrogated son, who was the natural son of the deceased, the arrogator might exclude the *agnati*; so that thus the right of inheritance would depend upon the will and pleasure of a stranger, which the law would not permit. Harris.

The prætorian fiction cannot extend to one person belonging at the same time to two families, Cod. de adopt l. penult.

§ 11. *Collatio filiorum naturalium et adoptivorum*, p. 197. In some editions this section is entitled *Differentia filiorum naturalium et adoptivorum, post quam fuerint emancipati.* See Dig. 38. 6. 4.

§ 12. *De bonorum possessione contra tabulas*, p. 198. See Dig. 37. 4.

§ 14. *De Emendatio juris antiqui. De adoptivis*, p. 199.

Constitutionem scripsimus, Cod. 8. 48. 10. *De adoptionibus.*

Ex Sabiniano, senatus consulto. By this law, a man who adopted one of the three sons of another person, was compelled to leave him a fourth part of his property. As by the constitution of Antoninus Pius, a fourth part also was to be left to a boy under puberty, taken into a family by arrogation. Vinn.

§ 15. *De descendentibus ex fœminis*, p. 200. Neither the law of the twelve tables nor the prætorian law, admitted descendants by the female line to the succession of a natural grand-father, or other maternal ascendant: for never having been under power of such ascendant they could never have been proper heirs. Nor could the prætor assist them as he did emancipated children *bonorum possessione unde liberi*, which proceeded on the fiction that emancipated children remained under power of their natural father: this fiction could not be extended to females, for the rule was, that children *quoad nomen et familiam*, followed the condition of the father. Hence natural grand-children were only called to the succession of their grand-father as cognates, and after the agnates were exhausted; this was the case, even after the Orphitian senatus-consult, had called sons and daughters to the legitimate succession of their mother.

The emperors mentioned in the text, admitted grand-children of either sex to the succession, whether descended *ex filio* or *ex filia*. Cod. Theod. de legit. heredit. l 4. copied nearly by Justinian. Cod. de suis et legit. hered. l. 9. These emperors, however, so far leaned toward ancient usage, that they defalked the portion of natural grand-children, by making that portion one third less than their parent would have had, when they were called conjointly with sons and daughters. And as persons frequently died, without leaving either proper heirs by the law of the twelve tables, or by the prætorian fiction, or legitimate heirs under the Orphitian law, if the question was as to a succession to a deceased person of the maternal side, the agnates with whom the cognates concurred, were entitled to a fourth part of the property of the succession. This was corrected by Justinian. Cod. de suis et legit. hæred. who put agnates and cognates on the same footing.

As to the defalcation of a third from the portion of cognates, when the grand-children descended from a daughter, succeeded concurrently with sons and daughters to a deceased in the maternal line, that was not corrected till the 118th Novel, ch. 1. by which children were called without distinction to the succession of their relations in the ascending line, and to the exclusion of all others.

Sed ut amplius aliquid. Suppose a man deceased had left a son, and a grand-child by a daughter, who died before the deceased, that grand-child would have only four ounces, and the son eight; less by a third than the daughter, if living, would have been entitled to: suppose a woman deceased, left a son or a daughter, and a grand-son or grand-daughter by a deceased son or daughter; the son or daughter

would be entitled to eight ounces, the grand-son or grand-daughter to four ounces.

Portionem nepotum vel neptum. Descendants by a female, were afterwards exempted by Nov. 18, from defalcation, when they concurred with descendants from a male. Nov. 18, ch. 4. and Nov. 118.

Ex cujusdam constitutionis auctoritate. Cod. Theod. de legit. hæred. l. 4. compared with Cod. 6. 55. 12. de suis et legit. hæred.

Nostra autem constitutione. Cod. 6. 45. 12. which forbids agnates to claim the fourth, granted to them by Cod. Theod. l. 4. de legit. hæred.

Sine ulla diminutione. Quartæ silicet agnatorum; tertiæ enim deductionem tributam iis, qui etiam juris veteris suffragatione nituntur, intactam reliquit: sed jure novissimo par est omnium liberorum conditio. Vinn. Nov. 118, ch. 1.

Sed nos cum adhuc dubitatio maneret, p. 201. In some editions a sixteenth section commences at these words, entitled, *Altera emendatio juris antiqui circa nepotes aut pronepotes ex filia.*

Titul. II. De legitima agnatorum successione, p. 203.

The law of the twelve tables says, *Ast si quis moritur intestatus, cui suus hæres non est, proximus agnatus familiam habeto.* Hence, if a *suus hæres* renounced, the agnati could not succeed, but the estate escheated; for the *suus hæres* remained, and the agnates were excluded. This gave rise to the pretorian law, which let in agnates and cognates by the *bonorum possessio unde legit.* and *unde cognati.* Cujas in paratit. Cod. de usucap pro hærede. This was extended by the senatus consultum Tertyllianum. Dig. 38. 17. 2. 8 and 10. and by the emperors Dioclesian and Maximinian, Cod. de leg. hæred. l. 3. and lastly, Justinian admitted the agnates fully in default of *sui hæredes*, or their not acting in the succession.

§ 1 *De agnatis naturalibus*, p. 203. *Agnates* are relations of the same family on the male side, and who have suffered no diminution of state (rank). *Cognates* are relations on the female side, or who have lost the right of agnates by diminution. Vinn. h. t.

Illegitimate children can have no agnates. *Quia neque gentem neque familiam habent.*

Consobrini. Strictly speaking, *consobrini, (consororini)* are sister's children.

Qui post mortem patris nanciscuntur. Dig. 38. 7. ult. and 38. 16. 1. penult.

§ 2. *De adoptivis*, or, as it is sometimes entitled, *De agnatis per adoptionem*, p. 204. Adoption joins the adopted son to all the agnates

of the father: adopted children, like proper heirs, are technical descriptions, and the creatures of the civil law. Dig. 38. 10. ult. 4. Dig. 38. 16. 2, 3. They are improperly called consanguine, inasmuch as this is strictly applied to natural relationship. Dig. 38. 16. penult.

§ 3. *De masculis et feminis*, p. 204. This is otherwise entitled, *Agnati, ad legitimam successionem ab intestato admittuntur absque ullo sexus discrimine.*

By the old law of the twelve tables, the female line was excluded. cognates yielded to agnates

By the middle law, sisters of the same father were admitted; consanguine sisters: and the prætor called women to the succession when they were related by the male line, but only in virtue of the right of proximity; *ex tertio nimirum ordine, per bonorum possessione unde cognati.* Hence they succeeded after agnates.

Justinian called all agnates, male and female, indiscriminately to the succession.

Germanæ: of the whole blood; *consanguineæ:* by the same father; *uterinæ:* of the same mother. *Consanguinei*, and *consanguineæ*, are expressions relating to brothers and sisters only; not beyond.

Nostra constitutione sancimus: Cod. 6. 58. penult.

§ 4. *De filiis sororum*, p. 207. By the old law (i. e. the law of the twelve tables) if there were no agnates, the estate escheated. To avoid this, the prætor called in cognates *per bonorum possessionem unde cognati:* afterwards the emperor Anastasius, directed that emancipation *per rescriptum principis*, should not take away the right of agnation between brothers and sisters, if inserted in the rescript. Cod. de legit. hæred. l. 11. Then maternal brothers and sisters, and their children, were ranked among the agnates, if the deceased left no brothers and sisters, or if they rejected the succession: and nephews, of different branches, were ordered to succeed *per capita*, and not *per stirpes*. hic, et Cod. de legit. hæred. l. 14. § 1. Finally, all these differences were abolished by the 118th and 127th Novels. The last direction of the present section of the Institutes is not altered by the Novels.

Non in stirpes sed in capita.] It appears from this section, that as yet brothers children were not allowed to represent their parents: for instance; if *Sempronius* had died intestate, leaving a brother, and children by two other brothers deceased; then, if the surviving brother had accepted the succession, the children of the deceased brothers, (i. e. the nephews of *Sempronius*) would have been entirely ousted; but, if the surviving brother of *Sempronius* had declined the inheri-

tance, the children of the two deceased brothers would have been entitled to a distributive share of their uncle's estate *per capita*, that is, by poll; because they would then take *suo quisque jure* each in his own right and not by representation. But by Nov. 118. cap. 3. and Nov. 127. cap. 1. brothers and sisters children are allowed to represent their parents; and yet this representation is only permitted by the civil law to prevent exclusion, when the party deceased leaves a brother, and nephews by another brother; and then the uncle and nephews take *per stirpes*; for, when there are only nephews, there is no representation; and the distribution of the estate is consequently made *per capita*, each person taking in his own right. This is also the certain rule of distribution in *England* in the case of collaterals. vid. 22. 23. Car. 2 Bacon's abr. verb. executors and administrators. Abridgment of cas. in eq. pag. 249. *Walch v Walch.* Harris.

See the case of *Carter v. Crawley*, in prohibition. B. R. 1681. Sir Thomas Raym. 496. in which the question was this: A man died, leaving no relations alive, save an aunt, and the children of another aunt deceased in his life time—shall the children succeed *jure repræsentationis*? This was a case on the construction of the Stat. of Distributions, 22 and 23. Ch. 2. ch. 20. and appears to have been decided in favour of the right of representation in the children. The opinion of civilians given at the end of this case is as follows: "In making "distributions of intestate estates amongst collaterals, our civil law "and the practice of the ecclesiastical courts have constantly observed "these two rules:

"The first is, *Repræsentatio in filius fratrum et sororum tantum locum habet, ad ulteriores vero collaterales non extenditur.*

"The second is, that in case there be no brothers nor brother's "children, *vocantur ad successionem reliqui collaterales quicumque in "gradu sint proximiores, remotioribus exclusis Ita quod infallibiter "semper prior in gradu sit potior in successione*, whereby representa- "tion must needs be out of doors; the next of kin, whether one or "more being only admitted to the distribution."

ROBERT WISEMAN,
THOMAS EXTON,
RICHARD LLOYD,
EDWARD MASTER,
WILLIAM TRUMBAL.

10 May, 1681.

§ 5. *De proximis vel remotis*, p. 207. Otherwise entitled *de agnatis diversi gradus*.

As the law of the 12 tables called in the nearest agnate only, it left no room for representation. Ulp. in frag. tit. 26. § 3. The 118th Novel, admits nephews to the succession of their uncles, or aunt's estate, conjointly with the brothers and sisters of the deceased.

§ 6. *Quo tempore proximitas spectatur*, p. 208. See Dig. 38. 16. 2. 4. 5, and 6.

§ 7. *De successorio edicto*, p. 208. Otherwise entitled *successio in agnatorum hæreditatibus, a Justiniano introducta.*

Successionem non esse.] *Veluti; decessit aliquis intestatus, extante fratre, extante et patruo: frater vocabatur, nimirum ut proximus; si igitur contingat, ut frater, aut, antequam adeat, decedat, aut hæreditatem repudiet, patruus aut agnatus venire non poterit, propterea quod lex duodecim tabularum successionem nesciat; hæreditas igitur ad fiscum deferebatur.* Theoph. *h. l.*

Nostra constitutione.] This constitution is not to be found; nor would it be of use, if it was still extant, since the 118th *Novel.* hath destroyed all distinction between *agnates* and *cognates*, and put them upon an equality. Harris.

The law of the 12 tables *(proximus agnatus familiam habeto)* called only the nearest agnate. If he died or renounced, the other agnates were excluded, and the estate escheated. Ulp. in frag. Tit. 26. § 4. Dig. 38. 16. 2. Paulus Lib. 4. sentent. Tit. 8: The prætor corrected this in some degree by calling in the second agnate, when the first died without accepting, or renounced; but he called them in the order of cognates. Dig. 38. 9. 1. 6. The constitution mentioned in the text, as well as the law of the text, was rendered null by the provisions of the 118th Novel.

§ 8. *De legitima parentum successione*, p. 209. Formerly a father emancipating a child *pacto contractæ fiduciæ*, became legitimate heir to the child, under a supposed analogy of a master and an emancipated slave. See Inst. Lib. 1. Tit. *de legitima parentum tutela.* But Justinian by his constitution, Cod. 8. 49 6. *de emancipationibus liberorum*, reduced all emancipations to that of *contractæ fiduciæ;* and the father succeeded to an emancipated son, as a patron did to his freed man. But all this was again altered by the 118th Novel. But the parents of a child dying without descendants, succeed per *stirpes.*

Tit III. De senatus consulto Tertulliano, p. 210. Justinian says, this law was made by Adrian, but Zonaras, Lib. 2. says it was made in the time of Antoninus Pius, called also Adrian, as being the adopted son of Adrian. Tiberius Claudius Cæsar, began to reign A. C. 16, and Adrian began A. C. 120.

§ 1. *De constitutione Divi Claudii*, p. 210. It is probable according to Vinnius and Heineccius, that this indulgence extended only to the mothers of children who fell in battle. Sueton. in Vita, ch. 19. *Claudius jus quatuor liberorum feminis dedit.*

§ 2nd. *Senatus consultum Tertullianum*, p. 211. This privilege granted to the mother to succeed to her children, was not conceded by positive law to uncles; but they were called in by Prætorian law *per bonorum possessionem unde cognati*, so that a consanguine sister being regarded as an agnate was preferred to them.

§ 3. *Qui præferuntur matri vel cum ea admittuntur.* p. 211. *Mater liberis onerata.* Cujas in ulp. frag. Tit. ult. for *onerata* read *honerata.* The Claudian law gave them as we have just seen the *jus quatuor liberorum;* hence children were an honour and a credit, not a burthen.

By this section, the mother was postponed to a *suus hæres*, (a proper or domestic heir) to the father, and to the consanguine brother.

As to the *suus hæres*. Domestic heirs in power, or emancipated, or persons considered as *sui hæredes*, excluded the mother; but children given in adoption, and in power of their adoptive father, at the decease of their natural father, did not. But by a constitution of Antoninus, they were admitted concurrently with the mother, *per bona poss. unde cognati*, which in this case excluded the *bonorum posessionem unde legitimi.* Dig. 38. 7. and Dig. 38. 8.

Further by the Tertyllian *senatus consultum*, children were not admitted to the succession of their mother, in preference to their grandmother: the *senatus consultum Orphitianum*, made about 20 years afterward, called them in. Hence a conflict arose between claimants under these decrees, the mother of the deceased, claiming under the Tertyllian, and the children of the deceased under the Orphitian decrees. This was at length decided in favour of the children Dig. 38 16. 11.

Secondly, the father was preferred to the mother, in military property, in adventitious property, and in respect of emancipated children however emancipated.

Thirdly, the consanguine brother was preferred to the mother. Cod. *Theod. de inofficioso, testamento*, l. 2. The consanguine sister was called in concurrently with the mother. But Justinian introduced many alterations. At first, when the deceased left a mother, with consanguine or uterine brothers, or with sisters, the mother was admitted in equal proportion. Cod. h. Tit. l. ult. when the mother was found with sisters only, she succeeded to half the property. Ib Afterward by Nov. 22. 47. 2. when the mother was left with sisters of the deceased, they inherited in equal portions: finally by Novel. 118. ch. 2. fa-

thers and mothers, were preferred to all collaterals, save brothers and sisters of the whole blood.

Suorum loco sunt.] Emancipated children by the prætorian law, and by the constitutions grand-children and great-grand-children by a daughter, are numbered *in loco suorum*, i. e. in the place of proper heirs. *vide t. 1. sect. 15. of this book.* Harris.

Ex constitutionibus.] *Si, matre superstite, filius vel filia, qui quæve moritur, filios dereliquerit, omnimodo patri suo, matrive suæ, ipso jure succedant; quod sine dubio et de pronepotibus observandum esse censemus. Cod. 6. t. 54. l. 11. Cod. 6. t. 57. l. 4.* ad senatus-consultum Orficianum. Harris.

Frater autem consanguineus.] "Porro, cum fratres duntaxat et so-"rores hoc loco matri objiciantur, existimandum est, cæteris a latere "venientibus, sive *agnatis* sive *cognatis*, matrem præferri. Sed et, "quia consanguineorum tantum mentio fit, credibile est, fratres et so-"rores uterinos senatus-consulto fuisse exclusos: cæterum *Justinia-*"*anus* hos etiam cum matre admisit, *vid. sect. 5.* Novellâ autem, "118 totum hoc jus mutatum est." *Vinn.* Harris.

§ 4. *Jus novum de jure liberorum sublato.* p. 212. *Constitutions.* Cod. 8. 59. l. 1. and l. 2. and Cod. de infirm. pen. celib. et orbit. l. 1. by which it will appear, that Constantine first abrogated the law inflicting penalty on celibacy: Honorius extended to every one, the privileges of those who had children; and Justinian accorded to all mothers, the *jure trium aut quatuor liberorum.*

§ 5. *Quibus mater proponitur et quibus admittitur*, p. 212.

This section is also entitled, *Abrogatio eorum in quibus constitutiones partim matrem adjuvebant, partim prægravebant.*

Cum antea constitutiones.] *vid. ll. 1, 2, et penult. Cod.* Theod. *de legit. hæred.*

Partim matrem.] Exempli gratia; "si contigisset, ut quis decede-"ret relinquens matrem, jure liberorum cohonestatam, superesset au-"tem et patruus, qui est legitimus, aut patrui filius, mater octo capi-"ebat uncias, sive bessem hæreditatis; patruus autem aut ejus filius "trientem; hoc est, quatuor uncias. Quod si ex contrario jus libe-"rorum mater non habuisset, tunc patruus aut filius ejus bessem hære-"ditatis capiebat, at mater trientem solum." *Theoph. h. t.*

Ita tamen, &c.] "Quæ sequuntur pertinent ad modum succedendi, "sive rationem distribuendæ hæreditatatis inter matrem defuncti, ejus-"que fratres et sorores. Constituit autem imperator, ut, si cum ma-"tre concurrant sorores solæ, sive consanguineæ sive uterinæ, duo so-"misses fiant, quorum unum mater, alterum sorores capiant; sin frus

"tres, sive soli, sive etiam cum sororibus, in capita hæreditas divida-
"tur, totque partes fiant, quot sunt personæ succedentium. Cod. 6.
"t. 56. l. 7. Hæc iterum mutata sunt *Novel.* 118. qua fratres et soro-
"res omnes, ex uno tantum latere defuncto conjuncti, tam a matre,
"quam a fratribus utrinque conjunctis, excluduntur; mater cum his ex
"æquis partibus succedit. *Vinn. h. l.* But in *England* the civil law takes place almost in the same manner, as it prevailed before the Novel constitution: for brothers and sisters by the half blood take equally with brothers and sisters by the whole blood: so that, if a man, whose father is dead, dies intestate, and is survived by a mother and by brothers and sisters, or by brothers only, or sisters only, then the mother, and the brothers and sisters, will all be intitled to take an equal share *per capita*, whether such brothers and sisters were related to the deceased by the whole blood, or by the half blood only. *Smith's case* 1 *Mod.* 209. 1 *Jac.* 2. *cap.* 17. Harris.

Tit. IV. De senatus consulto Orphitiano, page 214. This was enacted in 930 ab urb. cond. in the time of the emperor Aurelius; 20 years after the Tertyllian senatus consult.

§ 1. *De nepote et nepto.* p. 214.

Constitutionibus principalibus.] The *Tertyllian* decree conferred upon mothers the right of legitimate succession to their children; and the *Orfician* decree gave children the same right in regard to their mothers: but neither of these decrees went farther out of reverence to the old law; so that hitherto grand-mothers were called to the succession of their grand-children; and grand-children to the succession of their grand-mothers, by the indulgence of the prætor only; i. e. *per bonorum possessionem unde cognati*, and in default of *agnates*. ff. 38. t. 8. But the emperors, *Valentinian*, *Theodosius*, and *Arcadius*, called grand-sons and grand-daughters to the succession of their grand-mothers; prohibiting them nevertheless to take more than two thirds of that sum, to which their father or mother would have been entitled. l. 4. Cod. Theod. de legit. hæred. But the emperor *Justinian*, by his 118th Novel, cap. 1. makes the condition of all children equal, when they succeed their parents upon an intestacy. And, by the 2d chapter of the same Novel, the emperor calls also the grand-mother to the succession of her grand-children. Harris.

§ 2. *De capitis diminutione.* page 215. Otherwise entitled, *successiones quæ ex illis senatus consultis deferuntur, non perimuntur, minima capitis diminutione.*

See Dig. 38. 16. 11 and 38. 17. 1. 8.

§ 3. *De vulgo quæsitis*, page 215. Otherwise *naturales liberi matri succedunt.*

Qui vulgo quæsiti sunt. The *vulgo quæsiti* are those, whom the law emphatically calls *spurious*, their father being incertain and not known; but the mother, who is always certain, is allowed to succeed even her *spurious* issue; which is not permitted in England, where a bastard is reckoned as a *terminus a quo*, and the first of his family; he can therefore have no heir but of his body, and is deemed in law to have no consanguine relations, except his children; yet this must be understood, as to civil purposes; for, as to moral purposes, his natural relation to ascendants and collaterals is regarded by the law, which will not suffer such a person to marry his mother, or his base sister. *The Queen v. Chafin*, 3 Salk. 66, 67.

Ad matris hæreditatem.] The *vulgo quæsiti* or *spurious* children, are allowed to succeed their mother, unless she is a person of illustrious birth, having lawful children; for, if she has no lawful children, her illegitimate issue will succeed her. Cod. 6. t. 57. l. 5. And in general *spurious* children will succeed their mother equally with those, who are legitimate: and, even if *spurious* children are prætermitted in the testament of their mother, they may by the civil law complain of that testament as inofficious and undutiful. *De inofficioso testamento matris spurii quoque filii dicere possunt.* ff. 5. t. 2. l. 29. Yet spurious children are not in like manner entitled to succeed to the possessions of their father, whom the law does not regard, but supposes to be unknown. Children nevertheless, who are born of a concubine, when their father is certain, and dies without a wife or lawful issue, are entitled, together with their mother, to the sixth part of their father's inheritance, which is to be divided among them *per capita*, or by poll. Nov. 18. t. 5. cap. 5. But bastards, begotten in adultery or incest, are wholly incapable of succeeding to their father's or mother's estate. Nov. 89. cap. 15. But in England bastards are not distinguished into species, being all regarded in the same light, and esteemed equally incapable of succeeding to the personal estate of their intestate parents, being feigned to be *nullius filii*; so that no illegitimate child can take any part either of his father's or mother's estate upon an intestacy; neither can an ordinary or ecclesiastical judge grant the administration of an intestate's estate to the base born issue of that intestate. Swinb. 373. Yet any person, although he hath legitimate children, may by the law of England, bequeath any part, or the whole of his estate without control, and may consequently benefit his illegitimate children, or their mother, in what manner he pleases; for such persons are not incapable of tak-

ing by purchase, gift, or testament: and in this respect the law of England is more favourable to natural children, than the civil law; for, by that law, a man, who had lawful children, could not bequeath more than a 12th part of his possessions to his illegitimate issue. Nov. 89. cap. 12. It is also observable, that, though the law of England pays no regard immediately to bastards, yet it favours their issue under particular circumstances, in respect to real estates; insomuch that the issue of a bastard *eigne*, who died seized, shall bar the right of a *mulier puisne*. For example; if a man dies seized of certain lands in fee, leaving two sons, by the same woman, and his eldest son is a bastard, being born before his father's marriage, and the younger is a *mulier*, (that is, legitimate,) in this case, if the bastard enters upon the land, claiming as heir to his father, and occupieth it all his life without any interruption or entry made upon him by the *mulier*, and the bastard hath issue and dies seized of such estate in fee, and the land descends to that issue, then the *mulier* will be without remedy. For he may not enter, nor have any action to recover the land, because there is an ancient law in this case used; namely, *Justum non est aliquem post mortem facere bastardum, qui toto tempore vitæ suæ pro legitimo habebatur*. See Coke's first inst. sect. 399, &c. Bridal's lex spuriorum, pag. 100. Here note, that the term *mulier* is used, by the writers upon the common law, to denote either a son or a daughter lawfully begotten; but, how they came to apply the word *mulier* so very fancifully or rather perversely, it is hard to say, and immaterial to inquire; the most probable conjecture seems to be, that *mulier* is a corruption of *melior* or the French word *melieur*. Vide *Terms de la ley*, and Godolphin's *repertorium*. Harris.

§ 4. *De jure accrescendi inter legitimos hæredes*, p. 215.

Survivorship under the Roman law takes place among legitimate; and among testamentary heirs; and the share of those who renounce, will even fall to the heirs of those who accept. Survivorship, is real, attached to the estate, not to the person like substitution. Dig. de usufructu l. 36. Dig. 38. 16. 9. It was allowed, lest the testator should die partly testate and partly intestate, partly represented and partly unrepresented.

Under the English law survivorship takes place only when a legacy is given in joint tenantcy; and is allowed by the courts of equity, but not by the ecclesiastical courts. See on this subject *Humphrey v. Taylor*, Ambl. 137. *Mosley v. Bird*, 3 Vez. jun. 628. *Russel v. Long*, 4 Vez. 551. *Bolger v. Mackell*, 5 Vez. 509. In which it is laid down

that a legacy to two or more share and share alike, is a legacy in common, with no survivorship.

The *jus accrescendi* has already been touched upon in another connection ante ad Instit. Lib. 2. Tit. 7. § 4.

Tit. V. De successione cognatorum, p. 216.

Post suos hæredes.] "Lex antiqua duodecim tabularum duos tantum "hæredum ab intestato ordines fecit, suorum et agnatorum. Novæ "leges et senatus-consulta non addiderunt quidem ordinem novum, sed "personas quasdam, quæ nec sui hæredes, nec agnati, reverà sunt, suo- "rum hæredum et agnatorum numero esse voluerunt, atque in ordine "suorum vel agnatorum, una cum verè suis hæredibus aut agnatis, ad "hæreditatem intestati admitti. Inter suos hæredes novæ leges nume- "rant, suisque per omnia exæquant, liberos legitimatos; inter eosdem "quoque, et simul cum iis, vocant nepotes et pronepotes ex sexu femi- "neo: in agnatorum ordinem senatus-consulta transtulerunt matrem "et liberos: Justinianus fratres et sorores uterinos, eorumque et so- "rorum consanguinearum filios et filias: Anastasius fratres et sorores "emancipatos. Prætor vero tres succedentium ab intestato ordines "fecit; primum *liberorum*; (non dixit *suorum*, quia ex liberis vocat "etiam non suos;) alterum *legitimorum*, in quo vocantur agnati et ju- "ra agnationis habentes, ex posterioribus legibus aut ex senatus-con- "sultis; tertium *cognatorum*, in quo admisit omnes, quos sola sangui- "nis ratio vocat ad hæreditatem, licet jure civili deficiant; item eos, "qui, quod prioribus ordinibus exclusi essent, ex nullo alio capite "venire poterant. Tandem Justinianus cognatos omnes etiam hære- "des legitimos fecit, adempta agnatis omni prærogativa. Nov. 118. "Vinn. Harris.

See as to the prætorian law calling in cognates in default of proper and legitimate heirs, Cod. de legit. hæred. l. 5. and Dig. 38. 8. 1 and seq. Cognates are maternal relations. Legitimate heirs are agnates, and others considered as agnates, and called to the succession by the Tertyllian and Orphitian senatus-consults, and the imperial constitutions, as a mother in respect of her children, children in respect of a mother consanguine brothers and sisters emancipated by rescript, uterine sisters, and the children of emancipated brothers and sisters. Cod. de legit. hered. l. penult. § 1 and l. ult. § 2.

§ 1. *Qui vocantur in hoc ordine, &c.* p. 216.

Quos lex Anastasiana.] This constitution is not now extant; it was nevertheless without doubt inserted in the first edition of the Code, because it is here referred to; but it was probably omitted in the Code *repetitæ prælectionis*, on account of the last law in Cod. 6. t. 58. de [illegible]

git. hæred. *Qua plenius fratribus et sororibus emancipatis consulitur, et eorum quoque filiis ac filiabus jus legitimæ successionis datur.* Harris.

Non equis tamen partibus. Theophilus says that emancipated brothers and sisters received one half less than those under power: that a brother *capite diminutus* should receive but four ounces while a brother *integri juris* should have eight: but by Cod. de leg. hered. l. ult. § 1. emancipated brothers, and those under power were placed on a footing.

Aliis vero agnatis. If the deceased left an emancipated brother, and an uncle, the former would succeed in exclusion of the latter.

§ 2. *De conjunctis per fœminas*, p. 217. The 118th Novel. has superceded this section.

§ 4. *De vulgo quæsitis*, p. 217. The mother only is considered as related to a spurious child; hence they were permitted to succeed to the mother, if they were not the issue of adultery or incest. Justinian however admitted them to a share in the succession ab intestato to their father, if there were no lawful progeny, and the bastards were the offspring of a concubine. Dig. 38. 8. 4. compared with Dig. 1. 5 19 and 23. Dig. 1. 5. 19 and 24. Cod. de natural. lib. By the 118th Novel. they were admitted to share in their mother's estate with legitimate children.

§ 5. *Ex quoto gradu vel agnati vel cognati succedunt*, p. 217.

Usque ad sextum gradum cognationis.] It is not easy to determine what should induce the prætor to fix upon the sixth rather than the fifth or any other degree; and, concerning this, the writers have differed much in their opinions. But all, except *Hoffman*, agree, that the difference in the limits of succession between *agnates* and *cognates* hath ceased, since the distinction between *agnation* and *cognation* was abolished by Novel. 118. Taking it then for granted, that *cognates* can be called in as distant a degree as *agnates*, the next question will be whether *agnates*, can succeed in a more distant degree, than the tenth; which some deny; and urge, that *Justinian* would not have named the 10th degree, if *agnates* could have been admitted in a degree beyond it ——and that, unless some period had been put to the succession of *agnates*, the third and the fourth order of succession, in which are husband and wife, could never or very rarely be admitted; and from hence they conclude, that, though in consequence of the 118th Novel. both *agnates* and *cognates* must now be admitted without distinction, according to their proximity, yet this must be in the tenth degree, and not beyond it; and of this opinion are *Mynsinger*, *Faber*, *Wesembecius*, and others. But the words of *Justinian*, in the 3d sect. of the 2d title of this book, very strongly evince the contrary. v. g. *Inter masculos qui-*

dem agnationis jure hæreditas, etiamsi longissimo *gradu sint, ultro citroque capitur*, &c. And again, in paragraph the 1st, tit. 7. of this book, the emperor writes thus—*Amotis suis hæredibus*, agnatus, *etiamsi* longissimo *gradu, plerumque potior habetur, quam proximior* cognatus *tit. 7. de servili cognatione.* This is also the doctrine of the law of the *twelve tables*, which declares generally, without specifying any limits, that upon a failure of proper heirs, the nearest *agnate* shall succeed. And, as to the before-mentioned arguments, they may be answered without much difficulty; for we may safely pronounce, that the words *decimo gradu* are not here used determinately, but merely for the sake of giving an example. *Non enim* (says *Vinny*) *eodem modo de* agnatis *et* cognatis *imperator loquitur; de* agnatis *non loquitur determinative, sed ait, eos succedere, etsi decimo gradu sint, utens rotundo et certo numero pro incerto. De* cognatis *contra loquitur determinative; ait enim, eos succedere usque ad sextum gradum.* And, to the second argument, it may be answered, that a deceased person may leave no *agnates* by means of emancipation, or that his *agnates*, as such, may be ousted of their succession, by the death or refusal of the nearest *agnate*. See sect. 6. t. 7. lib. 3. So that there is no great reason to fear, that the third and fourth order of succession would have been always excluded by allowing *agnates* to succeed in the most distant degree. It therefore follows upon the whole, that *cognates* and *agnates* are now called to succeed equally, according to their proximity, and without any limitation. Harris.

Tit. VI. De gradibus cognationum, p. 218. See on this subject the note to Justin. Inst. Lib. 1. tit. 9. § 1. *Definitio nuptiarum, ante.*

§ 1. *De primo secundo et tertio gradu*, p. 218. see *Blackborough v. Davies*, 1 Lord Raym. 684. 12 Mod. 619. but best in 1 P. Wms. 51. wherein it was determined that the grandmother was nearer of kin than the aunt. *Woodroff v. Wickworth.* Prec. in ch. 527. 1 Eq. ca. ab. 268. In England all relationship respecting personal estate, is settled according to the civil law computation.

Ejus. Thii: the greeks called their parents θεοὶ, divinities; and applied the term *divine*, even to those who held the place of parents. Hence come the Italian words *Zio, Zia*, and the Spanish, *Tio, Tia*. (Pothier makes three sections, of this first section.)

§ 2. *Quartus gradus*, p. 219.

Consobrinus, consobrina.] It will be necessary to explain the following terms of relation before we proceed.—*Consobrini* and *Consobrinæ* denote cousins german in *general*; i. e. brother's and sister's children.—*Fratres patrueles* and *sorores patrueles* signify cousins germans, which

they are the sons or daughters of brothers.—*Consobrini* and *consobrinæ* in a *limited* and strict sense denote cousins german, who are the children of two sisters, *quasi consororini.*——*Amitini* and *amitinæ* are cousins german, who are the children of a brother on the one side and a sister on the other.——*Sobrini* and *sobrinæ* denote the children of cousins german in general.——*Propior sobrino* and *propior sobrina* denote the son or daughter of a great-uncle or great-aunt, paternal or maternal. Harris.

§ 4. *Sextus gradus*, p. 221. This section seems to distinguish *inter filium proprioris sobrini*, and *nepotem sobrini*; which however have the same meaning. Hence Vinnius thinks that the words *item proprius sobrino sobrinave filius* should be omitted. Il est vrai (says Ferriere) que si mon cousin issu de germain m'est parent au sixieme degre, son fils ne m'est parent qu'au septieme: c'est aussi ce qui est dit dans le. § 5. du titre precedent. Mais Justinien ne le compare pas ici avec moi, qui suis le cousin issu de germain son pere, car nous serions au septieme; mais il le compare avec mon pere, qui lui est parent d'un degre plus proche que moi, et qui est par consequent a son egard, parent au sixieme degre.

Tit. VII. De servili cognatione, p. 222. *Nostra constitutione:* this is not extant.

Tit. VIII. § 2. *De lege Papia*, p. 226. This law was passed A. U. C. 761, in the consulship of M. Papius Mutilus, and Q. Poppæus Secundus. Hence it is sometimes called *Lex Papia Poppæa.*

§ 3. *De constitutione Justiniani*, p. 226. *Nostra constitutio.* Not extant. *Ex constitutione nostra repleatur.* l. omnimodo Cod. 3. 28. de inoff. testam.

§ 4. *Quibus libertinis succeditur*, p. 228. *Nostra constitutione.* Cod. 7. 6. de latina libertate tollenda.

Tit. IX. De assignatione libertorum, p. 230.

Censuisse senatum. Under Claudian, A. U. C. 798.

Tit. X. De bonorum possessionibus. p. 231.

This is a branch of the prætorian law, by which a right of succession was granted, to all the property, estate, goods, chattles, rights and credits of the deceased. *Qua propter plurimum differt bonorum possessio a possessione seu corporali detentione rerum, quæ facti est.* l. 2. § 1. Dig. hoc. tit. l. 208. Dig. de verb. signif. *Sed bonorum possessio tota juris est.*

The *bonorum possessio*, was of various kinds, according to the condition and exigency of the claimants. *Bonorum possessio*, UNDE LIBERI: UNDE LEGITIMI: UNDE COGNATI: SECUNDUM TABULAS: CONTRA

TABULAS: UNDE DECEM PERSONÆ: TANQUAM EX FAMILIA: unde vir ET UXOR: confirming, supplying, correcting, or controverting the civil law.

The *bonorum possessio*, did not constitute an heir Inst. 3. 10. 2. The heir, is a creature of the civil, not of the prætorian law; though the person so called to the succession by the prætor, had many of the rights of an heir. But the heir under the civil law, held in absolute proprietorship, Inst. 2. 19. 7: the prætorian successor had the possession, and the *dominium utile*, but not the *dominium directum*. *l.* 1. *cum. seq. Dig. hoc titulo. l.* 117. *Dig. de reg. juris. l.* 138. *Dig. de verb. signif.* It was the right of claiming and recovering, and of retaining the effects of the deceased. Dig. h. tit, l. 3. § 2. It might be demanded by Proctor, which a heirship could not. Dig. 29. 2. 90. where for *curatorem*, read *procuratorem*.

Succession *per bonorum possessionem*, must have been demanded of the prætor: this was not necessary in case of heirship, wherein it was only necessary to act. A heirship might be entered upon within 30 years. A prætorian succession must be claimed within one year by descendants and ascendants, and a hundred days by other persons: Inst. 3. 10. 5. Succession *per bonorum possessionem*, was part of the equitable jurisdiction of the prætor. Thus by possession *unde liberi*, he aided the rights of emancipated children; calling them to the succession *(cum onere collationis)* together with proper heirs, by *unde cognati*, he assisted the natural pretensions of cognates who were before excluded: by *secundum tabulas*, he supported a testament otherwise void by the civil law, by calling in a posthumous stranger: *contra tabulas*, when a child was called to the succession, whose natural claims had been neglected and passed over by his father the testator: *unde vir et uxor*, by which the surviving husband or wife succeeds in defect of kindred: *unde legitimi* when parents or children (agnates) were called in, who would otherwise have been excluded. *Tanquam ex familia;* to the patron, or his agnates. *Unde decem personæ*, the enumeration of ten persons preferred by the prætor to a stranger who had manumitted a filius familias under the ancient forms of contract and sale. *Unde patroni patronæque*, when patrons were specifically called in to the succession of freed men: *unde cognati manumissoris:* when cognates of a patron manumittor were admitted. Hence there are two prætorian successions in case of a testacy, and eight in case of an intestacy. Concerning all of which see post Inst. lib. III. tit. 10. § 2. and 3.

Justinian abolished, *unde decem personæ*, *tanquam ex familia*, *unde patroni*, and *unde cog. manumittoris*.

In the case of possession granted *contra tabulas*, the claimant, to whom the succession was granted, was called upon to bring into hotch

pot or common stock, all the property he had at any time received of the testator by way of advancement; Cod. 6. 21. 12. 16. This was the COLLATIO: *bonorum possessio contra tabulas cum onere collationis.* Dig. 37. 6. 1. This Collatio, might have been exacted also in cases of intestacy from descendants, whether of the male or female side, (Nov. 18. 6.) but not from ascendants, collaterals, or mere legatees. Cod. 6. 21. 16. This was an exception to the general rule, *inter diverso jure succedentes, non est locus collationi.*

"Regularly those goods are brought into Collation or common fund, (Cod. 6. 21. 12 and 16.) which came from the ascendant, while alive, for the maintenance or provision of the descendant. But not gifts or rewards for services, Cod. 6 21. 10. and 20. 1. Nor the price of ransom from captivity in war, Cod. 8. 51. 17. Though money paid for a fine, or to save one from punishment, ought to be brought into contribution, for the fault of one, ought not to be prejudicial to another. So the portion, the jewels, the precious garments, the gold chains given to a daughter at marriage, Cod. 6. 21. 5. but not the expences of the marriage feast, for that seems to be given for the credit of the father and not as a portion; nor the charge of necessary education, for every child hath already had such a share, nor the charge which a father hath been at in books for his son, Dig. 10. 2. 50. Nor the charge that a father laid out for the son that he might take a degree, or acquire any other honourable title, Dig. 37. 6. 16. for if the son dies, his successor can derive no advantage by it. On this account, therefore, the cost expended in equipage for a son to go to the wars, shall come to the common contribution, because he receives pay from the publick. Cod. 6. 21. 20." Wood's Inst. civ. law. fol. 200. 201.

As to ADVANCEMENT, I have already referred to all the principal English cases on the subject. As to HOTCH POT, *Collatio bonorum, In partem positio*, see Co. Litt. 177. *Phiney v. Phiney*, 2 Vern. 638. *Edwards v. Freeman*, 1 Eq. Ca. ab. 249—254. and 2 P. Williams 445. *Hedges v. Hedges*, Finch Pre. ch. 269. *Hume et ux. v. Edwards ex. &c.* 3 Atk. 450. *Finner v. Longland*, 2 Eq. Ca. Ab. 253. *Northey v. Strange*, 1 P. Williams 340. and the Stat. of Distributions, 22 and 23. Ch. 2. ch. 10.

Jus bonorum possessionis.] The *bonorum possessio* is not now in use even in those countries, where the civil law prevails: for succession by testament, or by law, comprehends every case. "Jus civile et prætorium hodie in unam consonantiam redactum est; ideoque hujus "tituli nullus amplius est usus: etenim, qui aliis ex testamento et ab "intestato succedunt, in universum hæredes appellari solent." *Groe-*

newegen, de legibus abrogatis. h. t. In *England*, estates in general, may be divided into two sorts, *real* and *personal*; and successions to these two different kinds of estates are governed by different rules of law. But it is necessary to premise, that by *real* estate is most commonly meant an estate in land in fee, *i. e.* descendible from a man to his heirs for ever, and that by *personal* estate are meant estates in land, determinable upon years, money in the funds or upon mortgages, plate, jewels, &c. and that such *personal* estate is generally comprehended, in technical and artificial language, under the terms *goods* and *chattles*. Now in *real* estates there is no room for the *bonorum possessio* of the *Roman* law to take place in *England*; for all such estates vest in and descend instantly to the heir, at the death of his ancestor; but in regard to *goods* and *chattles* the office of the ordinary or ecclesiastical judge seems to be similar to that of the *Roman* prætor in granting the possession of goods. For, when a man dies, who has disposed of his personal estate by testament, the heirs or executors, appointed by that testament, must prove it before an ecclesiastical judge, who by granting probate gives the possession of goods to the executors *secundum tabulas*, according to the will, or at least confirms them in the possession already taken. *Cowell, h. l.* And, when any person dies intestate, the ordinary (by virtue of 31 *Edw.* 3. chap. 11, and 21 *Henry* 8. chap. 5) grants the possession and administration of the intestate's goods to the widow or next of kin to such intestate, or to both, at his discretion. And by the 22d and 23d of *Charles the second*, cap. 10. it is enacted, "that all ordinaries and ecclesiastical judges may call "administrators to an account and order DISTRIBUTION, after debts and "funeral expences are paid; to wit, one third to the widow of the in-"testate, and the residue among his children and those who legally re-"present them, if any of them are dead: that, if there are no children, "or legal representatives of them, one half of the intestate's estate shall "be allotted to the widow, and the residue to the next of kindred to "the intestate in equal degree, and those, who represent them: that no "representation shall be admitted among collaterals after brothers and "sisters children; and that, if there is no wife, all shall be distributed "among the children; and if no child, to the next of kin to the intes-"tate in equal degree and their representatives." And by 1 *Jac.* 2. cap. 17. it is enacted, "that, if a brother or sister dies, each brother "and sister, and their representatives, shall have an equal share with "the mother." From all which the analogy, between the *civil* law and the law of *England*, is very observable. Harris.

The Proem, *Cur introductæ bonorum possesiones;* contains in Harris's edition, the first section of Ferriere's; which begins at *Quos autem solus Prætor*, &c. p. 232 of the present edition, prope mediam paginam.

§ 1. *De speciebus ordinariis. Jus vetus, p.* 233.

A nostra constitutione.] This constitution is not extant.

Extraneo manumissori] "Extraneus manumissor erat, qui non con-"tracta fiducia emancipasset." *Mynsinger. h. l.*

Tanquam ex familia.] "Puto familiam significari *patroni; i. e.* hac "bonorem possessione vocari *patroni agnatos*." *Vinn.* Harris.

§ 2. *Jus novum*, p. 233.

I have already dwelt sufficiently on the different kinds of *bonorum possessiones* in the note to the beginning of this title.

Nostra constitutio.] *Cod.* 8. *t.* 49. *l. ult.* "Hæc constitutio, quam de "emancipationibus conscripsit imperator, omnibus parentibus et ma-"numissoribus præsumptionem contractæ fiduciæ admisit, ut ipsa e-"mancipatio tacitè id in se habeat; meritò igitur præfata bonorum "possessio pro supervacuâ habenda est, cum extraneus posthac manu-"missor nullus inveniatur. *Theoph.*

Per constitutionem nostram.] "Hæc est eadem græca constitutio, "cujus superius quoque aliquoties meminit imperator; et quâ totam "se causam successionis libertorum plene definivisse testatur: non ex-"tat hæc constitutio, sed epitomen ejus nobis ex *Basilicis* repræsentat "*Cujacius*." lib. 20. obs. 34 Harris.

The Basilica, were the new ordinances and code in Greek, began by Leo Philosophus in 886, and finally published by Constantine Porphyrogoneta, in 920.

§ 4. *De successorio edicto*, p. 235. *Certum tempus.* Dig. 38. 9. *De succ. edicto.*

§ 5. *De jure accrescendi et iterum*, &c. p. 336. *Ex successorio edicto.* Dig. 38. 9.

§ 5. *Explicatio dicti temporis*, p. 236.

Dies utiles.] "Dies in jure nostro alii sunt continui, alii utiles. Con-"tinui, qui sinè interruptione, nullisque exceptis, currunt: utiles sunt "illi duntaxat, quibus experiundi sui juris potestas est; et hi neque "ignoranti, neque agere non valenti, currunt, *ff.* 44. *t.* 3. *l.* 1 *Vinn. Theoph. h. t. Harris.*

Tit. XI. De acquisitione per adrogationem, p. 237.

Formerly under the acquisition by adrogation, the adoptive father succeeded to all the property of the son who was adopted by adroga-

tion, and died in that state. But latterly, the father succeeded to the usufruct only, unless when the son died impuber, and without children, and under power of his adoptive father. § 1. *et ult. Cod. commun. de success.*

§ 1. *Quæ hoc modo acquiruntur. Jus vetus*, p. 237. This is entitled in Ferriere, *Quænam olim acquirebantur per adrogationem.*

Prohibuit nostra constitutio. Cod. 3. 33. 16. *De usufructu.*

Freed men, were generally bound in services of labour to their patrons, *fabriles seu artificiales operæ*, which might be prolonged or commuted; and the right passed to the heir of the patron. Dig. 31 10. 6. Dig. 33. 2. 2. So, duties of personal respect on account of the gift of liberty conferred: these were attached to the person of the patron only. Dig. 31. 10 9. 1. juncto Cujacio, lib 17. ch. 14. These did not cease on the smaller change of state.

§ 2. *Jus novum*, p. 238. *Ex constitutione nostra* Cod. 6. 59. ult. Comm. de success. This section is entitled *Quænam jure novo per adrogationem acquiruntur*, in Ferriere. Justinian in this section has properly limited the rights of adoptive by those of natural parents; except in the case already mentioned of decease within puberty, without children, and under power of the adoptive father.

Tit. XII. De eo cui libertatis causa bona addicuntur, p 239.

§ 1. *Rescriptum Divi Marci*, p. 239. This requires, 1st, That the application and adjudication shall be judicial. 2dly, That there shall be no heirs or persons called to the succession, civil or prætorian. l. 1. Cod. fideicom. libert. 3dly, That the person petitioning, shall give security, if the adjudication be in his favour. 4thly, This relates to liberty given by testament.

§ 3. *Ubi locum habeat*, p 241. This section is otherwise headed, *Quibus casibus huic rescripto locus est*

From the 4th circumstance just above mentioned, Cujas appears to be right in supposing that instead of *certe si intestatus decesserit*, we ought to read *certe si testatus decesserit.*

§ 7. *De speciebus additis a Justiniano.* p. 242.

Plenissima constitutio, Cod. 7. 2. 15. de test. manumiss.

Tit. XIII. De successionibus sublatis, &c. p. 243. This section is divided by Ferriere, at the words *Erat et ex senatus consulto Claudiano*, &c.

Qualis fuerat bonorum emptio.] "Bona debitoris, postquam aliquan-"diu celeberrimis in locis proscripta pependissent, ex edicto possideri "jubebantur; deinde magister postulabatur et creabatur, per quem

"distrahebantur et emptori addicebantur, qui omnibus in solidum sa-"tisfaciebat: aut, antequam emeret, cum creditoribus de certa parte "decidebat." *vid* Theophilum *in hunc locum, et* Heineccii *antiq. Rom. jur lib.* 2. *tit.* 17. This exact species of sale is not in use in *England;* but there is a sale not very unlike it in the case of bankrupts, whose estates and goods are sold and divided among their creditors by commissioners, appointed for that purpose. *vid.* 13. *Eliz. cap* 7. 1 *Jac.* 1 *cap.* 15. 21 *Jac.* 1. *cap.* 19. 10 *Ann. cap.* 15. 7 *Geo.* 1. *cap.* 31. 5. *Geo.* 2 *cap.* 20.

Ex latioribus digestorum libris.] *D.* 42. *t.* 5 *De rebus auctoritate judicis possidendis. D.* 42. *t.* 4. *Quibus ex causis in possessionem eatur.*

Quod indignum nostris temporibus.] *vid. Cod.* 7. *t.* 24. *De senatusconsulto* Claudiano *tollendo.* Harris.

Tit. XIV. De obligationibus, p. 244.

Justinian begins first with obligation, and then proceeds to those contracts and agreements, from whence obligation arises. He confines it within the bounds of practice, namely to that motive of action which the sanction of the law presents to us. The civil law indeed treats of duties of imperfect obligation, but so far only as they are aided by the sanction which the legislative or judicial authority may annex to them.

Obligation may be divided into moral obligation, or that which receives its sanction *foro conscientiæ* alone: and civil obligation, or that which receives its sanction from the positive law of political communities.

The true source and foundation of moral obligation, has been a *diu vexata quæstio.* With me it is settled: it has but one rational source and foundation, *self interest:* our own happiness: our greatest and most permanent good upon the whole.

I considered this subject at full length formerly, in an essay published among a collection of essays on ethical and metaphysical subjects (1787): and as I have had no reason hitherto to alter my opinion, I shall briefly abridge that essay, and adopt the same view of the argument here.

It is universally allowed, that in certain cases, I ought (*morally* speaking) to act in a certain manner. But *why* ought I to do so? What is the *ultimate* reason or motive which on an attentive consideration of the subject should induce me to act in this, rather than in that manner? Because, say some,

I. It is agreeable to the will of God. *a*

II. To the eternal and necessary fitness and congruity of things. *b*

III. It is the dictate of the moral sense. *c*

IV. It is the dictate of common sense: of the [illegible] *d*

V. You are conscious of a sensation that impels you so to do. *e*

VI. Your understanding represents such an action to you as right, and of course that you ought to do so *f*

VII. It is agreeable to right reason. *g*

VIII It is agreeable to the truth of things. *h*

IX. It is conducive to general utility. *i*

X. It is conducive to the *bene esse*, to your own greatest good upon the whole. *k*

The above is the substance of the answers which the authors in the notes may be supposed to give to the question.

Each of these hypothesis, except the last, admit of a further question. You tell me I ought to act agreeably to the will of God—to the eternal fitness of things——to the dictate of the moral sense, &c. &c.? *why* ought I to do so? It is evident this question may be put

---

a *Aquinas, Occam, Scotus, Suarez, Hobbes, Leibnitz, Barbeyrac, Warburton.*

b *Grotius, Rust, Clarke, Balguy.*

c *Hutcheson.*

d *Lord Herbert, Reid, Beattie and Oswald.*

e *Ellis.*

f *Cudworth, Butler, Adams, Price.*

g *Burlamaqui*

h *Wollaston.*

i *Hume*

k *Gastrell, Cumberland, Pufendorf,* Norris,† Gay,‡ Turnbull,§ Rutherforth,¶ Soame Jenyns,** Dr. Johnson.††*

* *Law of N and N book I. ch. iv. § 5 and the note thereon of Barbeyrac*

† *Miscellanies. p. 214.*

‡ *Preliminary Dissertation, and note to King's Origin of Evil p. 66. quart. edit.*

§ *Note to Heineccius. p. 16.* ¶ *Essay on Virtue, ch. vii.*

** *Origin of Evil Letter IV.*

†† *Remarks on Soame Jenyn's Origin of Evil, in the Miscellanies published by Davies, 3 vols.*

reasonably: if so, the solution lies deeper than the hypothesis that admits of the question.

This question cannot reasonably, or consistent with common sense be put on the tenth or last hypothesis. It is manifestly, palpably absurd to ask, why ought I to pursue my own happiness? why ought I to follow that course of conduct which upon the whole of my existence will most effectually afford me the greatest sum of happiness? For in fact, are not all our motives of action, founded upon this consideration? Does it not arise from the very nature and constitution of man?

Why should I obey the commands of God? Because it is my interest so to do: I shall be happy if I do, and miserable if I do not. But put the case, that any clear and precise command of the creator, would upon the whole of my existence and all things considered, afford not a balance of happiness but of misery, can I be under any obligation to pursue it?—The controversy then, can only be settled, by an answer, that does not reasonably admit of any further question; and this is it.

But in the course of education in civilized society, we are taught incessantly by our parents and tutors, we hear in their conversations, and in discourses from the pulpit, and we learn from our intercourse with society even from our childhood, that certain conduct ought to be pursued, and certain actions ought to be shunned. That we should obey and reverence our parents, love our kindred, perform acts of kindness to our neighbours, speak truth, pay our debts, perform our promises, &c. &c.: these complex associations give rise at length to that feeling that we call conscience, and to the ideas of obligation and duty, which are associated with many actions that positive law cannot expediently embrace. Actions that mankind generally agree, ought to be performed or abstained from, when not sanctioned by the laws of society, give rise to *imperfect obligations*: actions that are enjoined or forbidden by those laws, are called actions or duties of *perfect obligation*.

By the civil law, rights and duties of imperfect obligation, such as arose from the acknowledged precepts of natural law, or the dictates of conscience, or *ex nudo pacto*, (naked promises not binding for want of consideration,) although they could not of themselves support an action, might be brought in aid of the law in certain cases. They gave rise to *compensation*, or set off; to *detention* of a pledge; to *fidejussion* or action against a guarantee; to a *constitutum*, or promise founded on natural obligation; to *novation*; and to *retention* of money paid under a mistaken notion of its being legally due.

To instance each of these. As to *compensation*: A owes B a hundred dollars, on a legal claim. B owes A fifty dollars, on a considera-

tion founded in morality, but not furnishing ground for suit: A, can set this off Dig. 16. 2. 6 de compensationibus.

Usury (interest for money) was not supported by the Roman law, unless where the loan, had furnished a profit; Cod. 4 32. 26. Cod. 4. 34. 4. or where it was judicially decreed *nomine pœnæ* for improper detention of the sum lent, or on account of fraud. Dig. 22. 1. 1. and 22. 1. 17. 3. Suppose, however, A. lends B a hundred dollars upon interest, and B pledges a diamond ring for repayment: the promise to pay interest simply would be *nude pact*, but still as promises ought to be performed. Dig. 2. 14. 1. A, may retain the diamond, till interest as well as principal be paid. Cod. de usuris. l. 4.

As to *fide jussion*. An infant almost of age makes a promise, unsanctioned by his tutor: this would support no action. A friend of the infant becomes his security for the performance. Here, notwithstanding the maxim *accessorium sequitur suum principale*, the fide jussor or guarantee, is liable, because it is the dictate of natural equity that a promise should be kept, although positive law will not enforce it. Dig. 46. 1. 2 and 6.

Constitutum, is a promise before the prætor to pay what was previously due, either by the promissor, or some other person for whom he becomes surety. Such a promise so solemnly made, was supported by the prætorian action *de pecunia constituta*, Dig. 13. 5. 1. 7. *quia grave est fidem fallere, proximus ubi geminata fides est.*

Novation. Dig. 46. 2. 1. *Novation*, is the transferring or conversion of one obligation into another obligation, or from one person to another person. Thus, A owes B a hundred dollars: this debt is transferred by consent to a pupil who promises without authority of the tutor: is he bound? Yes: for the promise of the pupil though it will not support a suit, is founded upon a promise that would support one: and this natural obligation of the pupil to pay, is converted into a civil obligation, by being substituted for a civil one: notwithstanding, Dig. 46. 2. 20. which though it seems to look the other way, does not furnish an objection. *Pupillus, quod sibi debetur, non potest sine tutoris auctoritate novare nec sic fit conditionem suam deteriorem facit* but this is for his own sake, and does not apply to a case when the legal right of a third person is involved in the point.

Repetition, or redemand of money paid without regular compulsion of law, is prohibited where an imperfect obligation intervenes. Dig. 44. 7. 10. A by nude pact, promises to pay me a hundred dollars: he pays it to me: but repenting, sues for the recovery, by *condictio indebiti* (action for money had and received). He cannot recover it

for he ought to keep his promise, and he has put me in possession of the money which he was under a natural obligation to give me, though not a legal one. Dig. 12. 6. 14 and 66. For the *condictio indebiti* would not avail against money paid, which *ex æquo et bono* ought to have been paid. Dig ub. sup.

This is like the cases of *Brown v. M'Kinnally*, 1 Esp. Ca. at N. P. 279. *Burdon v. Webb*, Ib. 528. *Cartwright v. Rowley*, Ib. 723. Whether an express promise founded on an antecedent moral obligation will support an assumpsit is discussed at length in note (a) to *Wennall v. Adney*, 3 Bos. and Pull. 249. This doctrine of the Roman law is adopted by Lord Mansfield, in *Moses v M'Farlane*, 2 Burr. 1005. *Dale v. Sollet*, Burr 2133. and though the particular case of *Moses v. M'Farlane*, has been shaken by *Marriot v Hampton*, 7 Term. Rep. 269, yet the general doctrine has never been denied.

§ 1. *Divisio prior.* p. 44. The prætorian, is as much a part of the Roman law, as the civil law. By the latter, technically speaking, is meant the law of the 12 tables, the Plebiscites, the senatus consulta, the imperial constitutions, and the responsa peredentum. The prætorian law, jus honorarium, is composed of the equitable decrees of the prætors at various times: to which we owe many obligations not strictly comprehended in the above named sources of the civil law, such as the constitutum, hypothecation, &c.

§ 2. *Divisio posterior.* p 244.

By the Roman law there are two grand divisions of private conventions, to wit, CONTRACTS and PACTS. *Contractus est Conventio habens certum nomen, vel causam, sua natura obligationem ad agendum, efficacem producens.* Dig. 2. 14. 7. 1 and 2.

Contracts between parties are so numerous, and so various, that the civil law, unable to assign a specific denomination to every one, classed by appropriate and distinct names, those contracts only, which were most generally in use in society. Hence contracts were divided into *nominate* and *innominate*. Nominate contracts were such as the *Commodatum*,* *Mutuum*, *Depositum*, *Pignus*, *Stipulatio*, *Emptio Vendatio*, *Lo-*

---

* *Commodatum:* the loan of a specific thing, of which the ownership is not changed, to be returned in good plight: as of a house, a horse or a book. *Mutuum:* a loan to be returned in kind, as money, grain, fruit, &c. *Depositum:* bailment of a thing to be kept without reward for keeping it, and to be returned in good plight. *Pignus:* a pawn of a moveable for security of a creditor. *Hypotheca:* is a mortgage of the right to real property, or things incorporeal; the debtor

catio, *Conductio*, *Emphyteusis*, *Societas*, *Mandatum*, &c. all which will be noticed in their turn. These had their appropriate remedy by action founded upon them. Some of them derived their obligation from natural, some from civil, and some from prætorian law.

Nominate contracts had also a four-fold classification. 1st, *Ex re*, from something done. 2dly, *Ex verbis*, from something said. 3dly, *Ex literis*, from something written. 4thly, *Ex consensu*, from something agreed to.

In contracts also were considered, the substance, the nature, and the accidental parts of the contract; but I do not find any important conclusion dependant on this division.

Contracts were also divided into equitable contracts, *ex æquo et bono*, and contracts *stricti juris*. Thus, if I sell an estate and deliver possession, and the money is not paid me till long after it is due, I have a right not merely to the principal, but also to interest for the detention of it. To this class of contracts may be referred those of our own law that admit of compensation when not literally fulfilled, and the cases of Cy pres performance. Contracts of strict construction, are those where the terms are precisely settled by the parties themselves; as the cases of damage liquidated by the previous agreement of the parties, as so much per acre for the ploughing up of meadow land, &c.

Innominate contracts, are those innumerable agreements, that depend upon and include the peculiar circumstances that form the object of them, and for which no certain or precise remedy was appointed, but a general action on the case only: *actio in factum præscriptis verbis*. Dig. 2. 14. 7. 2. Dig. 19. 4. and Dig. 19. 5.

But for the more convenient division of this kind of contracts they were classed thus. Do *ut des*: I give that you may give. Do *ut facias*: I give that you may perform. Facio *ut des*: I perform that you may give. Facio *ut facias*: I perform that you may perform.

The first is sale and barter: the second payment for work and labour to be done, or services to be performed: the third work and labour, or services, to receive payment: the fourth work and labour performed, or services rendered, for work and labour to be performed or services rendered. This last had the remedy by action *de dolo malo*, annexed to it. Dig. 4. 3. 18.

---

continuing in possession. *Stipulatio*; a verbal contract by question and answer. *Emptio Venditio*: buying and selling. *Locatio Conductio*: letting and hiring. *Emphyteusis*: an improving lease. *Mandatum*: a commission or power. *Societas*: partnership.

In all these innominate contracts, the obligation to performance on one side, is founded on actual performance by the other. Otherwise it amounts to no more than a mere promise, a covenant, an agreement, a PACT, which the parties may be under a natural, but under no civil obligation to perform. Dig. 2. 14. 7. 4. such a pact is called *nude (nudum pactum)* when no consideration *(causa)* attaches to it; but obligation arises, when the one side by performance in conformity to the agreement, suffers a loss, privation or inconvenience, or the other side by accepting becomes benefitted and a gainer, either as principal or surety.

Thus, I promise to give you one horse in exchange for another. This is not binding on either side, till one of us perform his part of the agreement. Then and then only, a consideration attaches to the pact, and an obligation arises thereupon coextensive with the consideration. This is like our doctrine of conditions precedent, where performance, or tender of performance with a touts tems prest, must be set out.

In all these innominate contracts and nude pacts, time was allowed to the parties to reconsider their agreement: *locus pœnitentiæ.* Thus, if I tender my horse in lieu of a horse agreed to be given me by my neighbour, and he takes no step thereupon to perform his part of the agreement, I can send for my horse back and refuse to accede to the bargain. *In contractibus nominatis, pœnitentiæ locus est, rebus saltem integris, ita ut is qui dedit ob causam, alium statim obliget, ipse vero si non obligatur priusquam alter conventionem impleverit. Quapropter rebus integris quod dedit potest repetere, per condictionem causa data causa non secuta. Quæ quidem actio non nascitur ex contractu, sed ex naturali æquitate quæ non patitur rem meam esse penes alium sine causa. Cod. de condict. causa data, causa non secuta. Dig.* 12. 7.

There are some good observations on the *locus pœnitentiæ* in Lord Kaimes's principles of equity Book, 1. part 2. sect. 7. and many cases put where it appears to one that in equity it ought to be allowed.

Pacts, were divided into civil, prætorian and simple. Civil were those to which a civil right of action was subsequently attached, as to the *Donatio inter vivos* by Justinian. Prætorian, such as the prætor gave a right of action upon, as the Hypotheca, and the constitutum. Simple, such as raised a natural obligation only to performance.

The doctrine of Nudum pactum has been long recognized in the English law. Bracton (who as Justice Wilmot says, interwove a great many things out of the Roman law) divides *pacta, conventa,* into *nuda pacta* and *pacta vestita.* Ch. 1. de actionibus. See also Br. ab. tit. action sur le case. 40. Ib. Dette pl. 36. 79. 206. 11 H. 4. 32. a. 9 H. 5.

14. 3 H. 6. 36. 44 E. 3. 21. *Sharrington and Pledall v. Strelly* Plow. 302. 308. 309. 7 and 8 El. *Joselyn v. Laciere.* 12 Mod. 295.

Wilmot in *Pillans and Rose v. Van Mierop and Hopkins*, 3 Burr. 1663, inclines to think that where an obligation is deliberately entered into *by writing*, that there can be no *nudum pactum*. The good sense of this opinion is rather pettishly contradicted by Skinner in his argument before the lords in *Rann v. Hughes*, reported in Br. Parl. Ca. and in the note to *Mitchinson v. Hewson*, 7 Term Rep. 350. a. which settles the technical distinction of contracts, into contracts *by parol* (including unsealed written contracts) and contracts *by specialty*. It is of no consequence how the law is, when it is once known; but it was surely an allowable mistake to suppose that a contract deliberately put down in writing, was not a parol contract. Wilmot seems to have had in his mind the obligatory effect given by the Roman law where the prescribed forms of verbal stipulations were observed. See post. Inst. 3. 16. 1. *De verbis stipulationum*. But among the Romans, the practice was to put all nominate contracts and stipulations in writing, which when carried to a magistrate were inserted *inter acta*, registered or recorded; and the parties had a copy delivered to them under seal. This was not the case with mere pacts or promises, which might intervene by means of any informal words, and between absent parties. Justice Wilmot's opinion I apprehend is law in most nations on the continent. See the references in Wood civ. law 206.

Although in the words of the lord chancellor in *Middleton v. Kenyon*, 2 Vez. junr. 408. "a bargain without consideration is a contradiction in terms and cannot exist;" yet in England this does not apply to 1st, Bargains entered into by writing under seal. 2dly, Mercantile or rather negotiable paper when once negotiated by indorsement: for as between the maker of a note and the payee, and the drawer of a bill and the payee, equitable defences may be set up. The exception depends upon its negotiability, and that negotiability is given by its being put into circulation by indorsement.

With respect to other parol contracts, whether verbal or written, we have adopted in substance the civil law doctrine on this subject, and the want of consideration will defeat a contract: but

Any labor, loss or inconvenience sustained by the plaintiff at the request of the defendant—any express promise to pay or perform what the promissor was under a moral obligation of paying or performing; whereon see *Wennall v. Adney*, 3 Bos. and Pull. 247.——Any promise made upon the strength of a consideration already passed, but originally entered into at the request of the promissor—or in consideration of services

to be rendered on a future day—or in consideration of any permission given by which the promissor is benefitted—or any voluntary performance of an act beneficial to the promissor, which the performer was legally compellable to perform, as in case of a surety—will support an action of assumpsit.

But though natural affection, be sufficient to raise a use, aid a trust or support a deed, (*Myddleton v. Lord Kenyon*, ub. sup.) it will not support an assumpsit: nor will love between the sexes.

But considerations founded on promise of marriage, will support a subsequent promise. *Argenbright v. Campbell*, and wife, 3 Hen and Munf. 184. Cro. El 59.

See on all these points, and the other parts of the doctrine of consideration when coupled with assumpsit, the modern compilers, Comyns Dig. Powel on contracts, Espinasse and Selwyn's, law of nis. pri: and Comyns, on contracts.

The subject is but meagerly treated in Pothier. The equitable nature of the action for money had and received, is treated in *Moses v. M'Farlane*, 2 1 Burr. 005. *Hawkes v. Saunders*, Cowp. 290.

I think the following rules collected by Wood (p. 207) for the construction of contracts, worth inserting in this place.

These *rules* ought to be observed in the interpretation of contracts.

b The agreement in a contract is the law of it.

c The beginning and consideration of every contract is to be considered.

d If the sense of the contract is obscure, that sense must be followed which is most likely and probable, or most according to common practice.

e In doubtful cases the mildest interpretation is the safest.

---

b *Contractus legem ex Conventione accipiunt.* D. 16. 3. 1. 6.

c *Uniuscujusque contractus initium spectandum est, et causa.* D. 17. 1. 8. *Hoc servabitur quod initio convenit.* D. 50. 17. 23. *Cujusque Rei potissima pars Principium est.* D. 1. 2. 1.

d *In obscuris inspici solere quod verisimilius est, aut quod plerumque fieri solet.* D. 50. 17. 114.

e *Semper in dubiis benigniora præferenda.* D. 50. 17. 56.

In re dubia benigniorem interpretationem sequi non minus justius est, quam tutius. D. 50. 17. 192. 1. *Semper in obscuris quod minimum est sequimur.* D. 50. 17. 9. *Eligendum est quod minimum habet iniquitatis.* D. 50. 17. 200.

f All parts of the contract ought to be explained, the one by the other, and regard ought to be had to the preamble of it

g If the intention of the Parties does evidently appear, the intention ought to be followed rather than the *words* or literal sense; and sometimes regard ought to be had to the custom of the country.

h If the terms of a contract are equivocal, that meaning ought to be followed which relates to the subject of the agreement.

i Interpretation ought to be in favour of him that is to be obliged by the covenant. For he that is obliged may be presumed that he designed to perform the least. And it was the other's fault that he did not express himself in better terms.

k If an agreement is in the disjunctive, he that is to be bound hath his election.

l Sometimes conjunctive words are to be taken disjunctively, when the sense leads to it.

m Those expressions which cannot be understood in any sense ought to be rejected, as if they had never been written.

n Superfluous words do not make a writing void.

---

f *Plerumque ea quæ in præfationibus convenisse concipiuntur, etiam in stipulationibus repetita creduntur.* D. 45. 1. 134. 1.

g *In ambiguis orationibus maxime sententia spectanda est ejus qui eam protulisset.* D. 50. 17. 96. *In Conventionibus contrahentium voluntatem potius quam verba spectari placuit.* D 50. 16. 219.

Semper in Stipulationibus et in cæteris contractibus id sequimur quod actum est. Aut si non appareat quid actum est, sequamur quod in Regione, in qua actum est, frequentatur. D. 50. 17. 32.

h *Quoties idem sermo duas sententias exprimit, ea potissimum accipitur quæ rei gerendæ aptior est.* D. 50. 17. 67. *Quoties in Stipulationibus ambigua Oratio est, commodissimum est id accipi, quo res de qua agitur in tuto sit.* D. 41. 1. 80.

i *In Stipulationibus cum quæritur quid actum sit, verba contra stipulatorem interpretanda sunt.* D 45. 1. 38. 18. *Pactio obscura vel ambigua Venditori et qui locavit nocere placet, in quorum fuit potestate legem apertius conscribere.* D. 2. 14. 39.

k *Ubi verba conjuncta non sunt, sufficit alterutrum esse factum.* D. 50. 17. 110. 3.

l *Conjunctio nonnunquam pro disjunctione accipitur.* D. 50. 16. 21.

m *Quæ ita sunt scripta ut intelligi non possunt, perinde sunt ac si scripta non essent.* D. 50. 17. 73. 3.

n *Non solent quæ abundant vitiare scripturas.* D. 50. 17. 94. Quæ

o Express words sometimes are prejudicial, which, if omitted, had done no harm.

p If the error of the notary in writing is apparent, the contract ought to be supported.

q In all contracts, where no day of performance is added, the performance ought to be presently.

r He that is to pay or deliver, is in no delay, till after the last moment of the day appointed.

s A time is fixed for the sake of him that is to be obliged.

t No one ought to be answerable for inevitable accidents, unless he entered into covenant to stand to them.

u Every thing may be dissolved by an act contrary to that which at first made it.

w No one can do an act to himself; as one cannot mortgage to himself, or buy, &c. what is his own.

x The agreements of private persons are not valid, if they are derogatory to the public interest.

y Those that do mistake do not consent.

Dubitationis tollendæ causâ contractibus inseruntur, Jus commune non lædunt. D. 50. 17. 81.

o *Expressa nocent, non expressa non nocent.* D. 50. 17. 195.

p *Si Librarius in transcribendis Stipulationis verbis erraverit, nihil nocet.* D. 50. 17. 92.

q *In omnibus obligationibus in quibus dies non ponitur, præsenti die debetur.* D. 50. 17. 14.

r. *Totus dies arbitrio solventis tribui debet.* L. 3. 16. 2.

s *In Stipulationibus promissoris gratia tempus adjicitur.* D. 50. 17. 17.

t *Quæ sine culpa accidunt a nullo præstantur.* D. 50. 17. 23.

u *Nil tam naturale est quam eo genere quodque dissolvere, quo colligatum est.* D. 50. 17. 35. *Omnia quæ jure contrahuntur contrario jure pereunt.* D. 50. 17. 100. *Fere quibus cunque modis obligamur in contrarium actis, liberamur, et cum quibus modis acquirimus, iisdem in contrarium actis amittimus.* D. 50. 17. 153.

w *Neque pignus, neque depositum, neque precarium, neque emptio, neque locatio rei suæ consistere potest.* D. 50. 17. 45.

x *Privatorum conventio Juri publico non derogat.* D. 50. 17. 45. 1. —*Utilitas publica præfertur contractibus privatorum.* C. 12. 63. 3.

y *Non videntur, qui errant, consentire.* D. 50. 17. 116. 2. *In omnibus Rebus quæ Dominium transferunt, concurrat oportet Affectus ex utraque parte contrahentium.* D. 44. 7. 55.

z What is prejudicial to the Parties contracting, is prejudicial to their heirs or successors.

a No Man is cheated that knows it and consents to it.

b An obligation to perform what is impossible is void.

c He that is to bear the loss of any thing, ought to receive the profits of it.

d He that contracts with another, ought to know who he deals with, his state and condition.

e An agreement to cheat is not valid.

f No one ought to enrich himself by doing injustice to others.

* No man shall take a benefit of his own wrong.

g Contracts against law and good manners are not to be observed.

h No one ought to be suffered to act against his own agreement.

i If one confirms what has been done in his name, he shall be esteemed to have given a commission for it.

---

z *Quod ipsis qui contraxerunt obstat, et successoribus eorum obstabit.* D. 50. 17. 143. *Non debeo meliaris Conditionis esse quam auctor meus.* D. 50. 17. 175. 1.

a *Nemo videtur fraudare eos qui sciunt et consentiunt.* D. 50. 17. 145.

b *Impossibilium nulla obligatio est.* D. 50. 17. 185. *Ea quæ dari impossibilia sunt, vel quæ in rerum natura non sunt, pro non adjectis habentur.* D. 50. 17. 135. *vid.* D. 50. 17. 182. *and* 188.

c *Secundum naturam est commoda cujusque Rei eum sequi quem sequuntur incommoda, et e contra.* D. 50. 17. 10. *Ex. qua persona quid sentum capit, ejus factum præstare debet.* D. 50. 17. 149.

d *Qui cum alio contrahit vel est, vel esse debet, non ignarus conditionis ejus.* D. 50. 17. 19.

e *Non valet si convenerit ne Dolus præstetur.* D. 50. 17. 23.

f *Jure naturæ æquum est neminem cum alterius detrimento fieri locupletiorem.* D. 50. 17. 206.

* *Nemo ex suo delicto meliorem suam Conditionem facere potest.* D. 50. 17. 134. 1.

g *Pacta quæ turpem causam continent non sunt observanda.* D. 2. 14. 27. 4.

h *Nemini licet adversus pacta sua venire et contrahentes decipere.* C. 2. 3. 29.

i *Si quis ratum habuerit quod gestum est, obstringitur mandati actione.* D. 50. 17. 60. *Ratihabitio retrotrahitur et mandato comparatur.* de Reg. Juris 10.

k The solemn form of contracts cannot be altered by private agreement, though the accidental circumstances may be altered.

l A legal contract may continue in force, though a case afterwards happens from whence it could not commence.

m A debtor is rather to be favoured than a creditor.

n Creditors upon good consideration ought to be paid before those that claim by gift, &c.

o He that has been forgiven a debt may be supposed to have received so much money.

p It is one thing to *sell*, and another thing to consent to a *sale*; where there is a different reason for it, or where the consent is to be from a different person.

q He that may alienate may consent to the alienation, where there is the same reason for the one as well as the other.

r He that may give a thing, may sell it, unless a particular law forbids it.

s No one takes away a thing by force that pays the full price of it.

t The creditor of my creditor cannot make a demand of me by paying my debt.

---

k *Nec ex prætorio nec ex solenni Jure privatorum conventione quicquam immutandum est, quamvis obligationum causæ pactione possunt immutari et ipso Jure.* D. 50. 17. 27.

l *Non est novum ut quæ semel et utiliter constituta sunt, durent licet ille casus extiterit, a quo initium capere non potuerunt.* D. 50 17. 85. 1.

m *Favorabiliores Rei potius quam Actores habentur.* D. 50. 17. 38.

——*Cui damus Actiones, eidem exceptionem competere multo magis quis dixerit.* D. 50. 17. 156. 1.

n *In re obscura melius est favere repetitioni quam adventitio lucro.* D. 50. 17. 41. 1.

o *Si quis obligatione liberatus sit, potest videri cepisse.* D. 50. 17. 115.

p *Aliud est vendere, aliud vendenti consentire.* D. 50. 17. 26.

q *Cum quis alienare, poterit et alienationi consentire.* D. 50. 17. 165.

r *Cujus est donandi, eidem et vendendi et concedendi jus est.* D. 50. 17. 163.

s *Nemo prædo qui pretium numeravit.* D. 50. 17. 126.

t *Nemo ideo obligatur quia recepturus est ab alio quod præstiterit.* D. 50. 17. 171.

u He that delays to pay what is due, pays less than is due.

w He ceases to be a debtor that has a good exception or plea in his defence.

x He does not delay payment who is willing and urgent to try the right.

y The creditors are not defrauded if a debtor does not improve his estate, but when he alienates a part of it.

z He is defrauded who is hindered from advantages that might have been made, as well as from present profit.

a In buying and selling the law of nations connives at some conning, and over-reaching in respect of the price.

b No one is supposed to be deceived while he acts according to law.

c The same thing cannot be demanded twice of the same person by virtue of the same obligation.

d In contracts the heir is answerable for the frauds of the deceased, where there is a covenant to bind him.

e No one can have a title by the fraud of another that acts for him.

---

u *Minus solvit qui tardius solvit. Nam et tempore minus solvit.* D. 50. 16. 12. 1. *Plus est statim dare, minus est post tempus dare.* L. 1. 20. 5.

w *Desinit Debitor esse is qui nactus est exceptionem justam, aut æquitate naturali abhorentem.* D. 50. 17. 66.

x *Qui sine dolo malo ad Judicium provocat, non videtur moram facere.* D. 50. 17. 63.

y *Non fraudantur Creditores cum quid non acquiritur a Debitore, sed cum quid de bonis diminuitur.* D. 50. 17. 134.

z *Generalitur cum de Fraude disputatur non quid habeat Actor, sed quid per Adversarium habere non potuit, considerandum.* D. 50. 17. [illegible]

a *In pretio emptionis et venditionis naturaliter licet contrahentibus se circumvenire.* D. 4. 4 16. 4.

b *Non capitur qui Jus publicum sequitur.* D. 50. 17. 116. 1.

c *Bona fides non patitur ut bis idem exigatur.* D. 50. 17. 57. *Quotiescunque concurrunt plures Actiones ejusdem rei nomine, una quis experiri debet.* D. 50. 17. 43. 1.

d *In contractibus quibus Doli prætatio vel bona fides inest, Heres in solidum tenetur.* D. 50. 17. 152. *In contractibus successoris eorum quibus successerunt, non tantum in id quod pervenit, verum etiam in solidum tenentur.* D. 50. 17. 157. 2.

e *Alterius circumventio alii non præbet actionem.* D. 50. 17. 49.

f Fraud is not to be judged of by the event only, but also by the design.

g He who is persuaded that he has a right, may be guilty of a mistake, and not of deceit.

h He that promises to pay, must have so much time allowed for payment, as the distance of the place, or the nature of the thing promised does require.

i A madman cannot contract at all, no not with the consent of his guardian; but a minor above seven years of age may contract by himself, where it is to his own advantage; and in all cases with the consent of his guardian when he is above that age.

Thus far of obligations, covenants and contracts in *general.*

Tit. XX. § 1. *De mutuo*, p. 245. Loan. This is a nominate contract, *stricti juris*, unilateral. The remedy is by personal action: *certi condictio.* Dig. 12. 1.

Hence interest is not due unless by express stipulation, or agreement. Dig. 22. 1. 3 and 30. Dig. 16. 3. 261. It relates to perishable articles chiefly; *res fungibiles; quarum una alterius vice fungitur*, as wine for wine: grain for grain: money for money.

The borrower has the property in the thing lent: herein the *mutuum* differing from the *commodatum. Mutuum* as the civilians say quaintly, *quia ex meo tuum fit.* Herein, it is required, 1st, that the loaner should own the commodity with power of disposal: 2ly, in case of loss, it falls on the borrower.

§ 2. *De indebito soluto*, p. 245. This is agreeable to the general principle, *In re obscura melius est favere repetitioni quam adventitio lucro.* It is more expedient to favour the Plaintiff in re-demanding what ought not to have been received, than the accidental or adventitious gain of the defendant. See further on the subject of this section post Inst. 3. 28. 6 & 7.

---

f *Fraudis interpretatio semper in Jure Civili non ex eventu duntaxat sed ex consilio quoque consideratur.* D. 50. 17. 79.

g *Nemo videtur dolo exequi, qui ignorat causam cur non debeat petere.* D. 50. 17. 177. 1.

h *Nihil peti potest ante id tempus quo per rerum naturam persolvi possit.* D. 50. 17. 186.

i *In negotiis contrahendis alia causa habita est Furiosorum, alia eorum qui furi possunt, quamvis Actum rei non intelligerent. Nam Furiosus nullum negotium contrahere potest: Pupillus omnia Tutore authore agere potest.* D. 50. 17. 5.

The *condictio indebiti*, approaches more nearly than any other form of action in the Roman law, to our action for money had and received; and the leading principle of that action is stated in the present section viz. *si apparet eum dare oportere*; if the defendant *ought* as an honest man, to pay the money.

The law laid down in the present section, that money paid by MISTAKE whether of fact or law may be redemanded (*repetita*) if in justice it ought to be repaid, is acknowledged not only in *Tomkins v. Barnet*, 1 Salk. 22. *Moses v. M'Farlan*, 2 Burr. 1012. *Farmer v. Arundel*, 2 Sir W Black. rep. 824. *Bize v. Dickason*, 1 Term Rep. 286. *Buller v. Harrison*. Cowp. 565. *Stevenson v. Mortimer*. Cowp. 806, but in the later decisions also of the English law. Thus, in *Townson v. Wilson, et al.* 1 Camp. N P. Rep. 396, assumpsit lies against Parish officers by the putative father of a bastard child, to recover the surplus of money paid to them as an indemnification for expences, the child soon after dying. So, no action can be maintained upon a note given by such putative father, beyond the amount of damnification. *Cole v. Gower*, 6 East, 110. *Wild v. Griffin*, 5 Esp. Ca. 141 : agreeable to the rule of the Roman law, that *condictio indebiti non datur ultra quam locupletior factus est qui accepit. Dale v Sollet*, 3 Burr. 2133.

So in *Buck v. Buck*, 1 Campb, 547, the ground whereon the court nonsuited the plaintiff was the illegality of the transaction, and plaintiff and defendant being in *pari delicto*, there was no reason to contravene the rule *melior est conditio possidentis :* this conforms with *Tomlins v. Bennet*, cited 1 Viner, 269, see also *Howson v. Hancock*, 8 Term Rep. 575.

So in *Rogers v. Kelly*, 2 Campb. 123, The same principle was contended for, viz. that money mistakenly paid may be recovered : but the nonsuit proceeded on the action being brought against the wrong person.

The general principle is also laid down by Shippen in *Levy v. U. of U. States*, 1 Binn. 27.

BUT WHERE both parties are under a common mistake, the one cannot recover of the other, if the person suing has derived any benefit whatever from the transaction. *Taylor v. Hare*, 1 new rep. (4 Bos. & Pul.) 260.

NOR CAN money paid with full knowledge at the time of all the circumstances of law and fact, be recovered back. *Bilbie v. Lumley and others*. 2 East, 4, 69. *Cartwright v. Rowley*, 2 Esp. Rep. 723. *Knibe v. Hall*, 1 Esp. rep. 84. *Brown v. M'Kinally*, Ib. 279.

NOR CAN money be redemanded, if it be paid where the law would not compel payment, but where natural equity would dictate it. *Bize v.*

Dickason, 1 Term Rep. 286. *Astley v. Reynolds*, Str. 915. *Farmer v. Arundell*, 2 sir W. Bl. rep. 824. *Moses v. M'Farlan*, 2 Burr. 1012

WHERE MONEY is paid by a person deceived, he may recover it. *Hasser v. Wallis*, 1 Salk. 28. 289. *Thomas v. Whip*, Bull. N. P. 130. 35.

WHERE MONEY has been paid under judgement of a court of competent jurisdiction, it cannot be recovered. The great case of *Moses and Macferlan*, 2 Burr, 1005, in which Ld. Mansfield traced the liberal principles that ought to govern the action for money had and received, has not met with the perfect sanction of the profession. It was shaken in principle by *Marriot v. Hampton*, 7 Term Rep. 269. and *Brown v. M'Kinally*, 1 sup. and Ch. J. Eyre strongly combats the form of action in *Philips v. Hunter*, 2 Hen. Black. 416. The old cases are discordant; see *Barebone v. Brent; Mead v. Death and Pollard; and sir Rich. Newdigate v. Davy*, cited by Viner, 1 Vin. ab. 268. 269. from Vern. 176. 1 Salk. 22. Lord Ray. 742. I fully concur with the principles of Lord Mansfield's decision in *Moses v. Macfarlan*. The court of conscience determined, that they were not competent to enter into a consideration of the agreement set up as a defence against the indorsements. The money therefore, was not recovered by Macfarlan against Moses by the judgment of "a court of competent jurisdiction:" else, I allow, it would be conclusive. If my suit depends upon considerations, which the court before whom *I am brought*, is prohibited from discussing, surely my case has not been determined by their passing upon evidence incomplete and imperfect, not from any fault or neglect in me, but incapacity in them. The form of action, in my opinion, sufficiently embraces the principle of the case.

WHERE MONEY has been paid on a void authority it may be recovered. *Lamine v. Dorrell*, 2 Lord Raym. 1216. Sir Rich. *Newdigate v. Davy*, 1 Lord Ray. 742. Bull. N. P. 133, which was for money formerly recovered in the high court of commissioners temp. Jas. 2: *Feltham v. Terry*, Cowp. 419. Lot 207. where money was paid to an overseer on a conviction afterwards quashed. *Jacob v. Allen*, 1 Salk. 27. where the attorney of an administrator improperly appointed, was held liable to an Executor.

But see the following cases which are at first sight adverse to these last mentioned decisions. *Pond v. Underwood*, 2 Lord Ray. 1210. *Sadler v. Evans*, 4 Burr. 1986. *Allen v. Dundas*, 3 Term rep. 125. The question is, whether the person or the court who gave the authority, were competent to give it, at the time when it was given. If so, money received under such an authority is not recoverable again by the person paying it: otherwise it is.

MONEY PAID on a consideration that has failed, or on a contract not performed, may be recovered, per Ashurst in *Stratton v. Rastall*, 2 Term Rep. 369.

So in cases of contracts for the sale of houses and lands, where they are not compleated, or where the title is defective. The cases herein cited by Comyns (on contr. 2d Vol. p. 52. N. seq.) I shall merely enumerate for the present, *Burrough v. Skinner*, 5 Bur. 2. 2639. *Flureau v. Thornhill*, 2 Bl. rep. 1078. *Richards v. Barton*, 1 Esp. N. P. rep. 268. *Camfield v. Gilbert*, 4 Esp. N. P. rep. 223. *Chambers v. Griffiths*, et al. 1 Esp. N. P. Rep. 150. compared with *Johnson v. Johnson*, 3. Bos. and Pull. 162. *Hunt v. Silk*, 5 East 449, *Farru v. Nightingal*, 2 Esp. N. P. Rep. 639. *Elliot v. Edwards*, 3 Bos. and Pull. 181. *Alpass v. Watkins*, 8 Term Rep. 516. *Bree v. Holbeach*, Doug. 654. *Cripps v. Reade*, 6 Term Rep. 606. *Robinson v. Anderton*, Peake's N. P. Ca. 94. *Gunn et al. v. Erheart*, 1 Hen. Bl. rep. 289. All these cases are cited in the same order by Comyns.

I forbear to notice here the question of damages in case of eviction, because although connected with this part of the subject, it may be more properly treated under the head of bargain and sale, or the action *ex empto*.

This ACTION lies in England for money paid on purchase of annuities, where title is not ready to be tendered on the day agreed on. See the cases in 2 Comyns Contr. 66.

Cases where this action has been brought to recover money received on contracts, rescinded or not performed, depend upon the act rescinding or putting an end to the contract itself. If one of the parties is empowered to do this, or if both parties consent that it shall be done, then the action for money had and received may be brought but if the contract still continue open, the remedy is an action for damages, wherein the contract must be stated and breaches assigned. *Towers v. Barrett*, 1 term, rep. 134. 1 Com. Dig. 134. citing 3 Lev. 364. *Weston v. Downey*, Doug. 23. *Power v. Wills*, Cowp. 818. *Payne v. Whale*, 7 East. 274. *Cooke v. Munstone*, 4 Bos. and Pull. 351. *Dutch v. Warren*, Str. 406. 2 Burr. 1010. *Holmes v. Kidgill*, Mod. 161. *Hogan v. Shee*, 2 Esp. rep. 522. *Giles v. Edwards*, 7 term rep. 181. *Dewbury v. Chapman*, Comber. 341. Holts' rep. 590.

Comyns under this head states the case of fees received by counsel for business not performed, which are not considered as recoverable in this action.

Notwithstanding a dictum in *Marsh v. Kavenford*, Cro. El. 588. and a case in 2 Leon. 111. fees to *counsel* are now considered as gifts

dam honorarium; a present, not a payment; and they are not recoverable by legal suit if not paid, nor subject to repetition when they have been paid *Thornhill v. Evans*, 2 At. 332. 3 Bl. Comm. 28. *Turner v. Philips*, Peake's cas. N. P. 122. *Chorley v. Bolcott*, 4 term rep. 317. The fees of physicians are on the same footing; but this rule does not extend to surgeons, apothecaries, attorneys, solicitors or proctors, who may demand by this action pay for their services. In the courts of Pennsylvania the practitioners act in the capacities of attorneys and counsel also, and can demand fees as I apprehend, in the former capacity only. But if a fee be given as a consultation fee, a retaining fee, or for legal advice, these will be sufficient considerations to prevent the repetition of it. That a fee may be recovered from an attorney in whatever capacity acting, paid beforehand for the performance of business not subsequently performed, has been directly determined in our courts.

At Rome, the counsel *(Defensores)* were the *Patroni*, who were the orators and pleaded the cause: *Advocati*, assistant counsel: *Procuratores*, proctors, managed the affairs of absent clients under special authority: the *Negotiorum Gestores*, were agents, or attornies in fact, under a general appointment: *Cognitores*, transacted the business of clients who were on the spot. For a long time, the patroni, received no fee as such for any particular cause; but it was the custom for their clients to make them presents, and bequeath them legacies. Cicero mentions it to the honour of Lucullus, that he received great sums in this way; and boasts that he himself had gained by this single article about £200,000. sterling. Nepos also mentions the sums so given to Atticus, as much to his credit. Middleton's life of Cicero, V. 2. p. 514. In the time of Cicero, only one counsel was allowed on a side: hence he occupied four days in his oration *pro Cluentio*, according to Pliny, Ep. L. 1 Ep. 20.

In the time of Pliny the younger, there were two allowed in cases of impeachment: but they had their portion of time assigned to them. Plin. Ep. L. 2 Ep. and Lib. 4. Ep. 9. In his time also, they received fees; and the senior counsel were accustomed to take into causes, the younger members of the bar. Ib. Lib. 6. Ep. 23. But by some of the later emperors the practice of taking fees, was strictly prohibited. In Justinian's time the fee *Præmium*, *Honorarium*, was not to exceed 100 aurei, for each cause. Dig. 50. 13. 1. 12. But if nothing was given or promised, they might sue for a reasonable compensation. Their office was *publici juris*, and they might be compelled to act. Cod. 2. 6. 7. Cod. 1. 16. 7. Dig. 3. 1. 4. Students underwent an examination.

Cod. 2. 8 3. Cod. 2. 7. 8 and 17. If counsel used abusive language, or defended their client by false statements, or betrayed his cause, (*Prævaricatores*) they were suspended, removed or otherwise punished. Cod. 2. 6. 6. Dig. 48. 10. 13. 1. Cod. 3. 1. 14. Cod. 2. 7. 1. There was a treasury advocate, similar to our attorney general; a salary officer, employed in public prosecutions. Cod. 2. 9. 4 and 10. 11. 5.

Notorious criminals were not allowed advocates. Cod. 3. 12. 8. this seems to be the origin of the English practice, where counsel allowed to a defendant in a criminal cause, is *ex gratia*. Criminals were bound to appear. Dig. 48. 1. 3.

In England, and in this country also, as I presume, the courts interfere in a summary way respecting the conduct of the bar. *Turner* v. *Philips*, ub. sup.

Money had and received will lie for premiums paid on marine insurance, in cases dependant upon condition—where no risk has been run—&c. &c. whereon consult 2. Comyns Contr. 86. and the compilers on insurance for references to the cases, Park, Marshall, &c.

The ACTION lies to recover back money paid on an illegal contract not executed, and when the suit aids the spirit of the law, by proceeding in disaffirmance of the contract. See the cases collected by Comyns, 2 Com. Contr. 108. et seq.

SOMETIMES the right to an office may be tried by indebitatus assumpsit against the present holder of it, to recover the legal fees received: and here also I refer to Comyns's collections of the cases which I have adopted, not for the purpose of borrowing from a book that deserves to be popular among the profession, but because his arrangement gives me an opening for observations that I can the more appropriately introduce.

I wish money had and received, had been brought long ago for fees in cases of removals from office, by the governors of this state; for there are so many objections to the practice, that I cannot consider the right of removal as fully settled even at this day. It is indeed a crying evil; tending in the last degree to degrade and demoralize the political character of the citizens; exciting and fostering an irritable spirit of political party, of selfish and insidious hostility, of avaricious and ambitious turbulence, destructive of private harmony and public confidence, and it threatens to fill the offices that ought to be the rewards of knowledge, experience and good character, with men who have nothing to recommend them but noisy insolence and servile

ignorance. I most sincerely wish the constitution itself could be freed from the imputation of giving sanction to this practice. Therefore, whatever may be the result of the attempt, I shall offer a few considerations to show that some doubts may be entertained, whether a fair construction of that instrument will justify the practice in question.

By Section 8. Article 2. of the constitution of Pennsylvania, the governor has a general power of appointing "*all officers, whose offices are established by that constitution, or shall be established by law, and whose appointments are not otherwise provided for.*"

Can he make an appointment for a less term than for life, under the power thus given to him by the constitution? For he has no other power in this respect, than what he derives from the words above quoted. The law of April, 3, 1804, ch. 2501, contains nothing to affect this question.

The constitution is a part of the law of the land; and must be construed according to the common rules of construing all legal instruments assigning powers, conferring privileges, or enjoining duties; to wit, in the way most likely to promote the public good, and least likely to infringe on the liberties of the people. The governor of the state is (not the servant, but) the agent of the people: and his powers, privileges, and duties, are to be construed, not in the way most serviceable to his interest, but to their's. Premising these observations, I submit to the reader, that

1st, A power to appoint to an office that is vacant, does not imply a power to remove from an office that is filled.

2ly, A power to appoint to public offices becoming vacant, is necessary to the public good, which requires them to be filled: but the power to remove a deserving officer, may serve to gratify private animosity, or promote electioneering interests, or remunerate electioneering services, but it is not necessary for the public good. The *public* interest, requires no other condition to the appointment, than *bene se gesserit*, so long as the person appointed shall behave himself well. 2 Anstruth. Rep. 620. 621. *Deverell's* case.

3dly, A power to appoint generally, does not imply a power of removal according to modern, as well as ancient decisions. Co. Litt. 233. a. b. 1 Sid. 74. 2 Anstr. 619. *Marbury v. Madison*, 1 Cranch 157. et seq.: this latter case seems to me to afford strong reasons in favour of my position. See also 3 Mass. rep. 160.

4ly, A power to appoint *generally*, will not authorize a *special* appointment. This follows from the known doctrine of the law, that every power and authority vested in an individual by law, must be

strictly pursued, and strictly construed: and the mode of appointment (where power of appointment is given) must follow the terms of the power. *Marbury v. Madison*, 1 Cranch 157. 162. 174. Com. Dig. Poiar.

5ly, A power to appoint generally, amounts to a power to appoint for life, or *quam diu bene se gesserit*. For if no term of limitation be made, how can the office legally terminate, but by death or misbehavior? This indeed, seems to follow of course. The law expressly is, that grant of an office *quam diu bene se gesserit*, and grant for life, amount to the same. Co. Litt. 42. 3 Inst. ch. 12 p. 117. 1 Show. Rep. 510. 523. 531 536. *Harcourt v. Fox*.

6ly, A power to appoint either for years, or *durante bene placito*, implies a coextensive power of removal, *ex vi termini*. For the same reason, a general power of appointment, so far from implying, negatives such a power of removal. More especially as it is the settled legal construction of such a general power, that when executed it is for life, or which is the same, during good behaviour.

7ly, The constitution furnishes no words that clearly give an uncontrolled power of removal If it be not given, it cannot be taken. Powers cannot be assumed by construction, or implication, unless when they are absolutely necessary to effectuate the purpose enjoined by the instrument conferring them: and even this case admits of some doubt. In the case before us, if an office be already filled by a competent officer, the purpose of the constitution is fully answered. The public good requires no further interference.

This reasoning holds stronger in the case of an executive magistrate of a republic, whose powers and privileges should be cautiously defined, and strictly construed in *favorem libertatis*. I know of no encroachments so dangerous, as constructive powers.

8ly, I would urge, that every office is an estate, a freehold: of which according to the known principles of law, no man can be legally deprived but for some cause known to the law. This is considered as a point settled in *Harcourt v. Fox*, 1 Show. ub. sup.

9ly, This practice, is contrary to all the analogy of offices, concerning which the governor has not this power. For misdemeanor in office, a judge may be impeached. For gross misconduct out of office, ascertained by verdict in court—for mental or bodily incapacity, he may be removed by address. Conviction by indictment of an infamous offence will furnish cause to displace a justice of the peace. But no conviction, no offence is so efficacious to remove an officer of the land office, a Prothonotary, a Clerk of the Sessions, of the Orphans Court,

of the Supreme Court, a Register, or a Recorder, as an offence against the good will and pleasure of the governor for the time being. Nor can any degree of knowledge, capacity, industry or integrity, retain such a man in office, who happens to have exercised his indubitable right of suffrage against the opinion of a successful chief magistrate. Surely, it could not have been intended that the innocent or conscientious exercise of the most important right that a freeman possesses in a representative government, should be convertible into a crime sufficient to divest him summarily of his vested freehold, and deprive him and his family of their support, without accusation, without proof, without trial, at the arbitrary will and pleasure of a governor. And this is not an imaginary case; but what happens almost universally on a contested election for a governor; and is become so common, that the depravity of public opinion begins to consider as right, this iniquitous system of political warfare and corruption.

10ly, In every grant, whether of a chattle, a landed estate, or an office, the grant is to be construed favourably to the grantee.

11ly, In offices that relate to the administration of justice, or that require much skill and experience, (as all those do, which I have enumerated) the bearing of the law founded on public expedience, is toward appointment for life, or during good behaviour. *Harcourt v. Fox*, 1 Show. ub. sup. and 4 Mod. Rep. 169. 174. 9 Co. Rep. 97. Sir *George Reynel's* case: the reasoning arguendo in *Veale v. Priour*, Hardress, 351. *Deverell's case*, in 2 Anstr. 620, 621.

That most of the offices I have enumerated, are considered as of great public consequence, appears from the requisites by law annexed to them. They require bond to be entered into for the due performance of the duties: previous residence within the county or district is required of the candidate: they are declared incompatible with the holding of offices under the United States. Would a man be required to have these qualifications, and to make these sacrifices for a tenure that may be put an end to at any moment? Moreover in the case of a Prothonotary or Clerk of a court, it is often three or four years before he can receive fees enough to support his family: they lie over till the event of the suit. Is it reasonable that a man should take an office of this description *pro hac vice*? In the case of *Avery v. the Inhabitants of Tyringham*, 3 Massach. Rep. 160, the court unanimously held that the contract with a minister for an indefinite period, was a contract for life with the usual condition of good behaviour, and that he could not be turned out at will. Otherwise, no man of education would accept the office.

In England all officers of justice, have a freehold for life in their offices, and cannot be removed but for misdemeanors: see all this strongly laid down in judge Wilson's Bacon Ab. Vol. 5. p. 200, and the cases there cited. Nor can the king himself grant an office, but according to ancient usage, (Ib 199): nor can he appoint an incompetent person as prothonotary, or master, or clerk of a court; otherwise, the court may refuse to admit him, or may remove him for incompetency, (Ibid. 203.) It would be very well for the state, if such were the settled law at the present day.

12thly, If power be given to appoint for life, or during good behaviour, or what is the same, to appoint generally, the law is, that any limitation is void; and the officer is in, not by the limitation, but by the prerogative, statute, instrument, or custom, that confers the power of appointment. The wording of the commission therefore is of no importance. *Hunt v. Ellisdon et al.* Dyer, 152. cited and confirmed by Justice Eyres, 1 Show. 517. *Colt v. Glover*, Hob. 153. cited and confirmed by Holt, 1 Sh. 535. *Harcourt v. Fox.* 12 Mod. 43. 200. *Saunders v. Owen*, 5 Mod. 386.

I do not again touch on the public good so manifestly requiring this construction, or on the public evils so strongly marking the prevailing practice: but I quit this side of the argument with observing, that, in a doubtful case the construction is by law in favour of the grantee.

I am well aware that formidable considerations arrange themselves on the opposite side of the question.

THIS practice has been acquiesced in during the whole of the administrations of Gov. M'Kean, and Gov. Snyder, and in two cases under Gov. Mifflin, Scott vice Redick, and Ross vice Jacks. But I do not wonder at this. All parties agree in the practice, as necessary to reward their partizans; and the officer removed, expects of course to be reinstated, when his faction shall again succeed to their opponents in politics. During the proprietary government, no man was ever removed from office compulsorily.

THE question, I have been told, has been agitated in N. York state, and the officer left without remedy: but I am not acquainted with the case, or its circumstances. At any rate, we are not bound by the precedent.

It has been urged, that the officers subjected to this power of removal, have no punishment for delinquency, or incapacity, annexed to them, and therefore that such a discretion is necessarily invested in the governor for the time being: but the legislature by annexing penalties to offences, as in the case of duelling, or by declaring the causes of a motion, can take away this necessity whenever they

please. In the mean time the officer for mis-user or non-user is open to indictment, and his bonds are liable to be put in suit.

THE constitution it is said, ought to be construed popularly, and not by the rules of strict law: but I do not know how to define a popular construction; and the rules of law are founded not merely on experience, but on considerations also of general expedience.

THE people (it is said) by the governor, their agent, have a right to resume *ad libitum* powers conferred for no certain time: to which I reply, that powers so conferred have always been construed appointments for life, with the usual implied condition of good behaviour. Nor have the people or their agent, any right to interfere in the construction of powers given by the constitution, while that constitution continues in existence. The incumbent once appointed, must be displaced by legal adjudication.

THE spirit of the English constitution leans to permanent appointments, whereas frequent changes, and even exclusion by rotation best harmonize with the spirit of a republican constitution.

Still, removals ought to be subject to some rule founded on the terms of the power given: nor is it a very republican construction, that converts the chief magistrate into an arbitrary tyrant, that exonerates him from responsibility, and authorizes him to punish his political opponents as criminals, and substitute private rancour for public justice.

MY construction it may be said, would deprive a governor of the choice of his confidential officers, such as a secretary of state, and compel him to retain his political or personal enemy in such a station. But this would seldom happen if the office were for life; and at all events, the officer is compellable to do his duty, and obey the directions of the chief magistrate, who may chuse his advisors where he pleases.

THE most permanent objection to my reasoning is, the undisputed practice under the constitution of the United States, wherein the words of the power are almost the same with those above quoted.

But I cannot think the analogy of the two cases will hold, considering that under the constitution of the United States, the exercise of the right of removal is subject to the formidable check of the senate's concurrence in the successor nominated by the president. A difference so important, as to destroy the force of all reasoning from the one to the other. A power in every instance controlled in its exercise by the senate, cannot be compared with a power in every instance uncontrolled; and exercised as the caprice of the governor for the time being, heated by recent opposition, and goaded by revenge, may dictate.

I do not pretend to urge these reasonings as conclusive, but I can not help thinking that under the magnitude of the evil, they are worth discussion. I state them with hesitation, but not without hope, that a similar view of the subject may be taken by some person more competent than myself to bring the subject into full day.

Under the mild administration of Gov Mifflin, there was not much to complain of on this subject. The personal virulence indulged in, against Thomas M'Kean, (upon the whole, the most able and independant Governor this state has yet known) might excuse many of his removals, even where reasonable objections to the officer in other respects, would not justify them. But the power itself, is not necessary to the public interest; it affords too much temptation to the exclusive gratification of private feeling; and its exercise of late years, has not tended to lessen the slightest of the objections to which it is liable.

As to the other cases wherein the action for money had and received will lie, I refer to 2 Comyns, 1—137, Selwyn and Espinass's Nisi Prius compilations, and Evans's Essays on this action.

§ 2. *De commodata*, p. 246. According to Ferriere and lord Holt, not merely *exactam* but *exactissimam diligentiam* is required. *Coggs v. Bernard.*

§ 3. *De deposito*, p. 247. This section is copied in substance by Bracton, lib. 3. ch. 2. 99. b. and adopted by Lord Holt in the leading case of *Coggs v. Bernard*, 2 Lord Ray. 915. I refer generally on all the doctrine of bailments, to Mr Balmanno's edition of sir W. Jones's treatise.

§ 4 *De pignore*, p. 247. Dig. 13. 7. 4. Ib. 13. 7. 6. Ib. 13. 7. 9. 3. Ib. 13. 7. 40. 2. This is a nominate contract *bonæ fidei*. The correspondent remedial action, is *actio pignoratitia*. It lies for the debtor to recover the goods pledged or pawned, and for the creditor for expenses, interest, &c. *i. e.* Damages, where the thing pawned did not belong to the debtor. Dig. 13. 7. 3. 8 and 9. The pawnee may retain his debt out of the value of the thing pawned before any other creditor. Dig. 20. 1. 10. The creditor is bound to exact diligence; for diligence may be classed under, the strictest care; strict care; ordinary care; slight negligence; gross negligence. The application of these shades of difference will be found exemplified in sir W. Jones's treatise and the cases referred to in Balmanno's edition. Strict care being required, the bailee will be liable for the consequences even of slight negligence.

Pignus, is the pledge of goods capable of delivery: *Hypothica*, is the mortgage of real property, or of rights not capable of delivery. Judge Burnet, enquires into this subject at some length in [illegible]

Rolle, 1 Atk. 165. and determines that under the Roman law actual delivery was not always necessary in cases of pawn; but in the English law it is. See on the same subject *Cortelyon v. Lansing*, 2 Caine's N. Y. ca. in error, 202. and *Jones v Smith*, 2 Ves. jun. 278.

Tit. XVI. De verborum obligationibus, p. 248.

Leonina constitutio. Cod. 8. 38. 10.

Stipulation, is a nominate contract, *stricti juris:* for the party promising only, is bound; and is bound only, according to the terms of his promise. The correspondent actions, are *certi condictio*, and *ex stipulatu.* The former being the remedy when some specific thing is the subject of the contract, the latter when there is no specific thing stipulated for. You promise to deliver me your brown gelding on such a day. Here the remedy is *certi condictio.* You promise to deliver me on such a day a sound horse of such a value. Here it is *ex stipulatu.* See Dig. 45. 1. 74 and 75.

For a commentary on the law of England as relating to this section, I refer to the case of *Brymer v. Atkyns*, 1 Hen. Bl. Rep. 175.

§ 2. *Quibus modis stipulatio fit*, p. 249.

Priusquam is dies præterierit: so in our law, if mortgage-money be to be paid by various installments, the mortgage cannot be sued till the day of the last installment be expired.

§ 3. *De die adjecto perimendæ obligationis causa*, p. 250.

Pacti exceptione submovebitur. Id est pacti conventi.

§ 4. *De conditione*, p. 250. A bond is not due till the event of the condition either by the Roman or the English law. Dig. 50. 16. 34 and 50 16. 213. Bacon's Ab. Debt. B.

The chance is transmissible. Dig. 45. 1. 57. Dig. 44. 7. 44. Conditional legacies might be received in præsenti by giving the Mutian security against the condition. Dig. 35. 1. 7. 35.—1. 18. 35.—1. 79. 2.

All the learning of conditional bonds, will be found in Serjeant Williams's note 1, page 66 to *Butter v. Wigge*, 1 Saunders, 66: and to *Fowel v. Forrest*, 2 Saund. 48. and to *Holdipp v. Otway*, 2 Saund. 108: to which may be added when there are several alternatives in a condition, option is with him who is to perform the act. Doug. 14. *Layton v. Pearce.*

If Defendant is the cause why a condition precedent is not performed, it is to him tantamount to performance. 1 Powel, 372. Sir Rd. *Hotham v. East, I. Comp.* 1 Term Rep. 638.

If obligor renders the performance of the condition impossible, the bond is forfeited. Secus as to the act of God, the act of the law, or the act of the obligee. *Hulbut v. Watts, et ux.* 1 Ld. Ray. 112. Co. Litt.

206. But it was decided in South Carolina, 2 Bay's 108, that if subsequent to a contract for the delivery of slaves, an act of the legislature forbids the delivery, the contractor is liable for their value in money.

§ 5. *De loco*, p. 250. So, bills of exchange are frequently drawn and accepted payable at a particular place.

§ 7. *Quæ in stipulatum deducuntur*, p. 251. The damages here noticed under the form of a penalty for non performance, seem liable to our equity decision, *necesse est actori probare, quod ejus interest.*

The following references on the subject of damages, may be of use.

Cases of damage assessed and stipulated by the contract itself? 16 Vin. 58. *Lowe v. Peers*, 5 Burr. 2228. *Stinton v. Hughes*, 6 Term Rep. 13. *Orr v. Churchill*, 1 Hen. Black. 232. *Astley v. Weldon*, 2 Bos. and Pull. 346. *Smith v. Dickenson*, 3 Bos. and Pull. 630. *Brangwin v. Perrot*, 2 Sir W. Bl. 1190.

Wherever damages are clearly assessed by consent of parties, a court of equity will not interfere on either side, but leave the party to his legal remedy. *Lowe v. Peeres*, 5 Burr. ub. sup. *Woodward v. Gyles*, 2 Vern. 119. *Rolfe v. Peterson*, 2 Br. Parl. ca. 436. *Ponsonby v. Adams*, Ib. 431. *Black v. East India Comp.* Finch. 117. *Roy v. D. of Beaufort*, 2 Atk. 190. *Small v. Williams*, Prec. in Chan. 100. But in all cases where the penalty can reasonably be construed into a mere security against *contingent* damages, equity will relieve; in the spirit of the words of this section above cited. *Benson v. Gibson*, 3 Atk. 395. Fonb. Eq. 142. 156. 2 Ib. 423, 424.

Damages are sometimes given beyond the penalty. Br. ca. in Parl. 16. *Elliot v. Davis*, Bunb. 23. *Hugh Audeley v* ——, Hard. 186. 1 Ch. ca. 226. 271. *Yea v. Lethbridge*, 4 Term rep. 433 compared with *Gunnen v. Lethbridge*, 2 Hen. Bl. 36. and *Evans v. Brander*, Ib. 547. in the case of a sheriff. *Lord Lonsdale v. Church*, 2 Term rep. 388. which overrules *White v. Sealy*, Doug. 49 and *Brangwine v. Perrot*, 2 Sir W. Bl. 1190 which two last however are conformable to *Wilde v. Clarke*, 6 Term rep. 303. *Hobson v. Trevor*, 2 P. W. 191. 1 Str. 533. 10 Mod. 511. *Blunden v. Barker*, 10 Mod. 462. *Perit v. Wallis*, 2 Dall. 252. *Graham v. Bickham*, 4 Dall. 149. *Smeedes v. Hoogtaling*, 2 Caines N. Y. Rep. 48. *M'Clure v. Dunkin*, 1 East. 436. But see the case of *Clarke v. Seton*, 6 Vez. 411.

Damages include debt, costs, and interest, *Holdipp v. Otway*, 2 Str. 107. *Blackmore v. Fleming*, 7 Term Rep. 447. *Philip v. Bacon*, 9 Mod. 298 and 304.

That the court may assess damages on a Judgment by default in plain cases without a writ of enquiry, or refer them to the prothonotary

wherever they are easily liquidated or depend on calculation, see Serj. Williams's note 2, to *Holdipp v. Otway*, 2 Saund. 107. to which add the following references. *Buthen v. Street*, 8 Term rep. 326. *Nelson v. Sheridan*, Ib. 395. *Byrom v. Johnson*, Ib. 410. *Maunsell v. Ld. Masareene*, 5 Term rep. 87. *Thelusson v. Fletcher*, Doug. 302. *Rashleigh v. Salmon*, 1 H. Bl. 252. *Andrews v. Blake*, Ib. 529. *Longman v. Fenn*, Ib. 541. 7 Vin. Abr. 301—308. Bailey on bills of exch. 66, 67. App. 5. Kidd, on bills of exch. 155.

The practice of the exchequer is contra. 1 Anstr. 249. *Chilton v. Harborn.*

As to the American cases to this point, see *Brown v. Van Braam*, 3 Dall. rep. 355. *Purviance v. Angus*, 1 Dall. rep. 185. *Graham v. Bickham*, 4 Dall. rep. 149.

In England the arrears of an annuity are not allowed beyond the penalty of the bond; nor interest; unless in very special cases. *Mackworth v. Thomas*, 5 Vez. 329. Indeed the whole doctrine of interest beyond the penalty, even in cases of bond, where the penalty is the debt, is shaken by *Clarke v. Seton*, 6 Vez. 411. but aliter where the action is on the judgment.

The cases respecting damages on eviction by title paramount, I will briefly refer to here, but I shall have occasion to discuss that question hereafter. That damages in this case are not recoverable beyond the purchase money and interest, *Staats v. Executors of Ten Eyck*, 3 Caines N. Y. rep. 111. *Pitcher v. Livingston*, 4 Johns. N. Y. rep. 1. 4 Johns. N. Y. rep. 18. *Morris v. Phelps*, 5 John. N. Y. rep. 49. *Bender v. Fromberger*, 4 Dall. rep. 441. *Marston v. Hobbs*, 2 Mass. rep. 433. *Gore v. Brazier*, 3 Mass. rep. 523. Semble, *Nelson v. Matthews*, 2 Hen. and Mum. 164.

The contrary doctrine is held, Kirkby's Connect. rep. 3 and in *Liber and wife v. The Executors of Parsons*, 1 Bays South Car. rep. 19. *Executors of Guerard v. Rivers*, Ib. 265. and 4 Massach. rep. 108.

But one damages for one injury. You may sue several, and without entering up judgment, elect *de meliorius dampnis*. Bull. N. P. 7. 19. 11 Co. rep. 6. 7. Roll. ab. 31. 1 Com. Dig. 125. Burr. 1423. Cro. Jac. 118. 1 Salk. 10. 1 Lord Ray. 370. 2 Bac. 9. Esp. Dig. N. P. 318. 518. 1 Johns. N. Y. rep. 290. 1 Hen. and Munf. 488. 2 Hen. and Munf. 38. 355.

These are some of the more general heads of the doctrine of damages, which I have thus referred to, because I do not know where the cases appropriated to them are elsewhere collected. The technical doctrines on this subject, are beside the purpose of these notes.

The damages here alluded to by Justinian for the purpose of covering a breach in the stipulation, do not apply to the damages arising from injuries done, or reasonably expected; which will be treated Lib. IV. tit. XV. *de obligationibus quæ quasi ex delicto oriuntur.*

Tit. XVII. § *De stipulatione pura*, p. 253. See *Dean v. Newhall*, 8 Term rep. 168. *Nadin v. Battie and Wardle*, 5 East. 147.

Tit. XIX. § 1. *De judicialibus stipulationibus*, p. 255. Judicial and prætorian stipulations agree in this, that they are both compulsory on the party. They differ, in as much as, 1st, The judicial relate to the jurisdiction of the judge, the prætorian are confined to subjects and persons under the jurisdiction of the prætor. 2ly, The judicial stipulations, are subsequent to the hearing of the cause, *quia tum demum judex quis esse incipit.* Cod. de lite contest. Prætorian on the contrary take place previous to or, pending a case; *etiam lite non contestata* Dig. 3. 2. 40. penult. 3ly, Judicial stipulations act upon the party only, and do not require sureties or pledges; while the Prætorian, always require security, Dig. 46. 5. 7.

§ 2. *De prætoriis*, *p.* 255.

Ut in iis contineantur Ædilitiæ. Ædilitiæ stipulationes sunt, quibus venditor cavet de morbis etvitiis rerum venalium: puta rem morbosam non esse: servum fugitivum non esse: et de ceteris, quæ edicto ædilium promittuntur. Dig. 21. 1.

Prætoris ergo vocabulum hic in sensu latissimo, accipi videtur pro quovis magistratu cui est jurisdictio. Heinecc.

An instance of these Prætorian stipulations, is our writ of Estrepement. In *Jefferson v. The Bishop of Durham et al.* 1 Bos. and Pul. 108. it was determined that no *court of law*, had the power of issuing a writ of prohibition to prevent a bishop from committing waste; and it was not settled whether the court of chancery had. In *Williams v. Macnamara*, 8 Vez. 70. injunction against cutting trees that "CONTRIBUTE *to ornament.*" In *Smith v. Collyer*, 8 Vez. 89. injunction against cutting timber was refused, where the title was disputed, because it was trespass and not waste. It would have been better had the law been otherwise, for the reason of the thing is clearly with the applicants.

These *Ædilitian stipulations*, were the warranties of sound commodity and good title, exacted of every seller in favour of every buyer.

The old *Ædilitian law* was very strict, and required the seller not only to declare all the faults of the slave, the animal, the commodity he sold, but held him bound even for those faults he did not himself

know. Thus Dig. 21. 1. 1. 2. *Causa hujus edicti proponendi est, ut occurratur fallaciis vendentium et emptoribus succurratur, quicunque decepti a venditoribus fuerint. Dummodo sciamus venditorem etiam si ignorarit ea, quæ Ædiles præstari jubent, tamen teneri debere. Nec est hoc iniquem. Poterit enim ea nota habere venditor: nec interest emptoris cui fallatur ignorantia venditoris an calliditate.* To remedy these cases of fraud or of ignorance on the part of the seller, they gave the action *quanti minoris*, the action *redhibitoria*, and the action *ex empto*.

The action *quanti minoris*, was given to a purchaser who was induced to pay an extravagant price for a commodity, beyond its value. Certainly rejected with great propriety in modern times, as an inconvenient practice, encouraging law suits without number.

The *actio redhibitoria* compelled the seller to take back the commodity and return the price, where the quality was worse than might reasonably be expected, and rendered the article purchased unfit for the purposes of the purchaser. In some cases of refual on part of the seller, this was an *actio in duplum*, compelling the seller to pay double the original price.

The *actio ex empto*, was given on defect of title, and in cases of eviction; of which hereafter.

The civil law maxim doubtless is, that a sound price warrants a sound commodity: 1 Domat. 80. and so it has been determined in *Whitefield v. M'Cleod*, 2 Bays, 380: and so indeed it seems to me the case ought to be determined. But this is not the law of England or of Pennsylvania, where the maxim is *Caveat Emptor*, and where in common cases, the seller warrants nothing but his title to the commodity sold. Nor has the purchaser any remedy on discovery that his purchase is defective or unsound, unless he made a previous and special stipulation, that the seller should stand to all defects. The cases in England establish these principles.

1st That the seller is bound by his warranty of title at or just before the sale. But he is not bound by a warranty made after the sale is compleated. Finch's law, 289.

2ly That a warranty given at one time, when no sale takes place, does not bind even between the same parties, at a subsequent time, when a new contract with sale does take place, 1 Str. 414. *anonymous*.

3ly That no action lies as to the quality of the thing sold, unless there was fraud or deceit in the conduct of the seller at the time, or unless there was on his part an express warranty of the quality. If the plaintiff proceeds on the ground of fraud, he must prove that it was with

knowledge in the seller at the time, *scienter*; and this must be laid and proved in an action of trespass on the case.

If he proceeds on an express warranty, he may bring assumpsit for the money, but he must distinctly prove such a warranty.

4ly That where there is no deceit, or no warranty pretended, the seller is without remedy as to the quality.

5ly That the sale of a personal chattel raises an implied warranty of title, has been decided in *Defrees* v. *Trumper*, 1 Johns. N. Y. Rep. after 2 Bl. Comm. 451. and the civil law: that it is sufficient to support assumpsit for the price paid.

6ly But no action of deceit will lie against the seller who sells without title, unless a scienter be proved: *Medina v. Stoughton*, 1 Lord Ray. 593. Nor even then, if the seller was out of possession; for that ought to have put the purchaser on his guard. Ib. and *Roswell* v. *Vaughan*, Cro. Jac. 196.

That there is no implied warranty of quality, appears from the following cases. Co. Litt. 102. 1 Fonb. 109. 371. 373. n. k. 2 Bl. Com. 451. *Gov. and Co. of the B. of England v. Neuman*, 1 Lord Ray. 442. *Price v. Neal*, 3 Burr. 354. *Stewart v. Wilkins*, Doug. 20. *Bree* v. *Holbech*, Doug. 630. *Pasley v. Freeman*, 3 Term Rep. 57. per Buller. *Fenn v. Harrison*, 3 Term Rep. 757. *Mead v. Young*, 4 Term Rep. 28. *Fydell v. Clark*, 1 Esp. Rep. 447. *Williamson v. Allison*, 2 East, 446. *Parkinson v. Lee*, 2 East, 314. a leading case. *Dunlop v. Waugh*, Peake's Ca. N. P. 123.

Musgrove v. Gibbs, 1 Dall. 217. *Moses Levy, v. Bank of the U. S.* 4 Dall. 434. 1 Binn. 27. *Seixas v. Wood*, 2 Caine's N. Y. Rep. 48. *Snell et al. v. Moses et al.* 1 Johns. N. Y. 96. *Perry v. Aaron*, Ib. 129. *Defrees v. Trumper*, Ib. 274.

This seems to me a most demoralizing principle of decision. I know of no argument, that can be adduced to prove, that if I give a hundred dollars for a commodity that ought to be worth a hundred dollars, I am defrauded if it be worth only ten. You say the seller knew nothing of it. My answer is, that before he took a hundred dollars from me, he ought to have known that the thing he pretended to sell was reasonably worth that price. He had every means of knowing this; and to sell it for a hundred dollars without knowing it, is as much a fraud as if he had asked a thousand. Generally, the buyer relies on the seller. Nor can the buyer cheat the seller; whereas, the seller under our law, in nine instances out of ten, may cheat his buyer with impunity. The rule of *caveat emptor*, ought to be changed into *caveat venditor*. It is a disgrace to the law that such a maxim should

be adopted, and I rejoice to see that the good sense of the South Carolina bench has revolted at it.

The chancery cases in support of this rule, ought to be classed as cases in support of falsehood and fraud. *Oldfield v Round*, 5 Vez. 508. *Shirley v. Davis*, cited 6 Vez. 678. *Dyer v. Hargrave*, 10 Vez. 505. *Bowles v. Atkinson*, Sugd. 199. Anon. in chan. 1803. Ib. 214. Notwithstanding some gleams of common honesty appear in *Mellish v. Motteux*, Peake's ca. 115. compared with *Oldfield v. Round*, 5 Vez. 508.

That it is the duty of the seller to declare the faults of the commodity before sale, is not only conformable to the Ædilitian injunctions, but is sanctioned by Cicero, Grotius, Puffendorf and Valer. Maximus. See the reference in Sugden's law of vendors and purchasers, page 1.

Tit. XX. De inutilibus stipulationibus, p. 257. Things to which no title can be made, are not the subjects of stipulation. But if they be sold by contract, the purchaser thus deceived has his action *ex empto*. Dig. 18. 1. 25. 1. Dig. 18. 1. 4. 5. Dig. 18. 1. 62. 1.

§ 3. *De facto vel datione alterius*, p. 258. I do not see the valid reason of this; for if A promise that his debtor B shall pay C a hundred dollars, and C gives a fair consideration, relying on the promise, it is in fact the promise of A to pay the money: there is an implied guaranty.

§ 4. *De eo in quem confertur obligatio vel solutio*, p. 258. This is headed in Ferriere, *Alteri stipulari non licet.*

To the doctrine of this section there are three exceptions: a father may stipulate for his son, or vice versa: a debtor may stipulate in favour of his own agent, or his creditor: where the promissor is bound in a penalty wherein the stipulator is interested.

§ 10. *De conditione impossibili*, p. 261. I have already treated of impossible conditions. By the English law, a bond with an impossible condition, is a single bond. Co. Litt. 206. 209. But if a possible condition be made void by the act of God, the act of the law, or the act of the obligee, the obligation is saved. In *Tuteng v. Hubbard*, 3 Bos. and Pull. 291. a Swedish vessel freighted by a British subject was embargoed: held that the freight could not be carried by proceeding after the embargo was taken off when the goods embarked would have been out of season. The reason of this section will apply to immoral and illegal conditions.

§ 11. *De absentia*, p. 261. *nostra constitutione*, Cod. 8. 38. 14.

§ 12. *De stipulatione post mortem*, p. 262. Because it may enure to

the heir. See a case somewhat like this, *Burgh et al. v. Preston*, 8 Term Rep 483

§ 16. *De promissione scripta in Instrumento.* p. 263. This is analogous to justice Wilmot's idea, that there can be no nude pact, if deliberately written.

Tit. XXI. De fide jussoribus, p. 266. That stipulation and promise may be more certain, *Caution* and *Sureties* may be added to them. *Fide jussor*, a surety, called otherwise *repromissor*, *adpromissor*, *sponsor*, *prædes*, *vades*, is one who binds himself in the same contract conjointly with the debtor, for the greater security of the creditor or stipulator.

Fide-jussor, differs somewhat from Expromissor, who discharges the first debtor, and assumes the debt. Dig. 12. 4. 4. *Fide jussio* differs from *Constitutum*, which is a promise on a nude pact without stipulation. Inst. 4. 6. 9.

Dr. Wood, from whom I have taken the above, adds gravely, "It "is made a question whether our Saviour was fide jussor, or sponsor "only, or expromissor for the Fathers under the old testament." A question that may safely be left to the Canonists to discuss.

The obligation of a surety binds his heirs, though no mention be made of them. Inst. 3. 21. 2. In England, the executor is, but the heir, is not so bound. 1 Inst. 209. a. 210. b.

If there be more sureties than one, each is bound in solidum, Inst. 3. 21. 4. whether it is agreed or not; but by the later law, they are allowed three advantages, viz.

1. *Beneficium ordinis, sive excussionis, seu discussionis:* by which he may compel the creditor to sue the principal debtor, first. 1 Nov. 3. c. 1. Unless security were given judicially in a cause pending against the principal.

2. *Beneficium divisionis.* Inst. 3. 21. 4. by which the creditor is driven to resort to each surety for his proportional share only.

3. *Beneficium cedendarum actionum.* By which a surety sued for the whole debt, can demand of the creditor to transfer over, his actions against the other sureties, before he shall recover the whole from the one sued.

The surety becomes bound co-extensively with the debtor, in respect both of sum and time. Nor can he bind himself beyond that. Inst. 3. 21. 5. Dig. 46. 18. 7. If the surety is in danger, he may sue before the time of payment, or demand indemnification. Dig. 17. 1. 38. 1. If the surety being sued, makes a bad defence, the debtor may except to paying him. Dig 17. 1. 8. 8. and 29. 4.

Minors, Inst. 3. 20. 9. and Soldiers, Cod. 4. 65. 31. are prohibited

from being sureties. So are women, under the senatus consultum Velleianum, Dig. 16. 1. pr. Wood. civ. l. 226, 227.

The judiciary cautions or securities belong to another place.

The common fide jussion, is an accessary stipulation. Dig. 45. 1. 5. 2.

Fide jussors might be taken in cases *ex delicto et quasi ex delicto.* Dig. 45. 1 8. 5. and 45. 1. 70 but in respect of pecuniary penalties and punishments only.

Fide jussors bind their heirs, because the latter receive the benefit of all the civil contracts of the decedent. Dig. 44. 7. 49. Dig. 50, 17. 59.

In a former part of the notes, I gave an account of the case of *Thursby v. Gray's administrators*, at the court of common pleas, Northumberland county; vide ante p. 462. Since writing that note I have had occasion to enquire further concerning that case: and I find by my friend, Mr. Watts, who took the exception to my charge, that although the case was but slightly argued either before me, or before the supreme court, the substance of his objections to my opinion, was as follows:

That as the seller did not chuse to sell his goods on the credit of the purchaser alone, but thought fit to insist on two persons to be jointly bound, he had a right so to do: therefore as to him, they were both principals; though with respect to each other, they might stand in the relation of principal and surety. Of their contracts, interests, or motives, he could not have, and need not have any knowledge: all he was to look to, was, two securities equally and jointly bound; and such were *Spring* and *Gray*. They might dispose of the goods between them as they pleased: the one might be a nominal, the other a real purchaser; or they might be joint purchasers; or neither might be the real purchaser; but both become joint and equal obligors. His right therefore was against both and either.

The cases of negotiable notes do not apply: for the course of mercantile transactions, require that mercantile paper should be current on the faith of each and every name that appears upon it: for one man, may prefer it for one name, another for another.

Every indorser is a fresh drawer, and every name on the paper a principal. The reason of speedy notice is, that the person who has passed the note, and to whom notice is to be given, has put the right of calling for payment out of his own power, and transferred it to the holder.

The cases of security for the performance of services, have no relation to the present case.

Here, both parties undertake the performance of the condition of the bond; in the cases of services to be performed, one only is to perform them: and if he neglects the duty, his employer alone can know it, and alone can give notice of the neglect.

I do not know what answer to give to this agreement, conclusive to my own mind: and I incline therefore to agree with the decision of the court. *Nesbit v. Smith*, would go near to bear out my charge; but in that case the surety gave notice to the obligee to sue, who afterward gave time at his own risk. The early chancery cases go the full length of my doctrine; but they are too brief, and too loosely reported to be relied on. To the list of references that require strict construction in favour of sureties, add *ex parte Rushworth*, 10. Vez. 409. *Eddowes v. Neill*, 4 Dall. 133 and *Ludlow v. Simond*, 2 Cain's cases in error. N. Y. pages 29 and 57. I have dwelt the longer on *Thursby v. Gray's*, Adm'rs. because I regard it as a case of great practical importance, and which I hope to see more fully reported with the reasons of the decision at length.

§ 4. *De pluribus fide jussoribus.* p. 267. In *Cowell v. Edwards*, 2 Bos. and Pull. 268. and the next case, *Sir Edward Deering v. Lord Winchelsea*, it was determined that one of many co-sureties paying the whole debt, could only sue each of the other co-sureties for his ratable proportion. These cases are commented on with some disapprobation by the Lord Chancellor in *Craythorne v. Swinburne*. They appear however to be conformable to the civil law doctrine; and are well founded in equity, though perhaps not in public expedience, inasmuch as they no doubt, tend to the multiplication of suits.

To this title respecting fide jussion, should be added Inst. lib. 4 tit. 14. § 4. *Quæ exceptiones fide jussoribus prosunt vel non*, wherein the general rule is laid down, that sureties may avail themselves of all the defences which their principal might have used.

Tit. XXII. De literarum obligationibus. p. 269.

Ex principalibus constitutionibus. See the constitution of the Emperors Honorius, Theodosius, and Constantine, in the second book of the Codex Theodosianus, title *Si certum.*

Per nostram constitutionem. Cod. 4. 30. 14.

This proceeds on the principle of our limitation acts.

Tit. XXIII. De obligationibus ex consensu. p. 270. These differ from stipulations wherein the presence of the parties was necessary. Dig. 44. 7. 2.

Tit. XXIV. De emptione et venditione, p. 271. This is a nominate contract confirmed by the civil law. It supercedes Barter and Ex-

change, the most ancient mode of traffic. It gives rise to the action *ex vendito* against the buyer, for the price agreed on; and to the action *ex empto* against the seller, in case of defective title or defective quality, in the thing sold. Dig. 18. 1. 28. The buyer bringing the action *ex empto* must tender the price, and the seller suing *ex vendito* must tender the thing sold.

Hence, nothing forbids that one man should sell the property of another: he does so at the risk of the action *ex empto*, in case of eviction. Dig. 18. 1. 28.

The seller is considered as in all cases warranting the title. After the bargain is completed, the purchaser stands to all losses. Even an express agreement, that the seller should not warrant the title against his own act, was void, as encouraging fraud. Dig. 2. 14. 7. 7.

Warranty under the Roman law, is either express or implied. It is implied in every case, but may be enlarged or restrained by express covenant. Dig. 19. 1. 11. 18. unless the warranty be so restrained, the seller is bound to answer not only the price paid but the damages. *Evicta re, non ad pretium dumtaxat recipiendum, sed ad id quod interest competit; ergo et si minor (minoris pretii) esse cepit, damnum emptoris est.* Dig. 21. 2. 70. This is fair reciprocity. The value is considered, not at the time of the sale, but at the time of eviction, and each party runs his chance of what value the article may then be. Dig. ub. sup. Dig. 19. 1. 45. Sub init. and Dig. 21. 2. 66. 3. in fin. If one hath built or planted on an estate, and is evicted, either the person recovering or the person who made sale without title, must stand to the damages sustained by the boná fide purchaser. *Illud expeditius videbatur: si mihi alienam aream vendideris, et in eam ego ædi ficavero, atque ita eam dominus evincit. Nam, quia possim petentem dominum, nisi impensam ædificiorum solvat, dolo malo exceptione summovere; magis est ut ea res ad periculum venditoris non pertineat. Quod et in servo dicendum est, si in servitutem, non in libertatem evinceretur, ut dominus mercedes et impensas præstare debeat. Quod si emptor non possideat ædificium vel servum, ex empto habebit actionem; in omnibus tamen his casibus, si sciens quis alienum vendiderit omnimodo teneri debeat.* Dig. 19. 1. 45. 1. It appears to me that both cases should be put on the ground of the *scienter*: viz, if the owner *knew* the building was proceeding, he ought to pay the value to the person evicted; if the seller *knew* he had no title, the whole damages ought to fall on him. And such I apprehend would be the law even in Pennsylvania and New York, in cases of eviction from real property by title paramount. If the seller *knew* his defect of title, he ought to be liable not merely to principal and interest, but to all

damage. The buyer was liable for mesne profits, and if the improvements exceeded the mean profits, the buyer had the advantage. Dig. 5. 1. 48. If the buyer makes a weak defence, and does not vouch the seller to warranty, the latter is discharged. Dig. 21. 2. 53. When the buyer has given notice to the seller of the adverse suit, the latter is bound to attend to the defence. Dig. 21 2 63. 1. The buyer might bring *ex empto* on discovery that his title was bad, even before suit brought by the real owner. Dig. 19. 1. 30. 1.

There was no distinction as to warranty, between real and personal property. Cod. 8. 45. 6.

Under the Roman law, the contract by mutual consent of the parties constituted the *Emptio venditio:* which was compleated by delivery on one side, and payment on the other. The payment of the stipulated price, or even of earnest money *(Arrha)*, was not of the essence of the contract: it was binding by mutual consent alone. It was consummated indeed by payment and delivery, but its obligatory nature existed before. The *arrha* (earnest) was evidence only of the contract, *argumentum emptionis et venditionis contractæ.* The *Locus Pœnitentiæ* was allowed, while the mutual assent was as yet incomplete in point of form; (section 1 of this title) and if exercised, was exercised on the terms prescribed in this section. But the *emptio venditio, did not* require the verbal forms prescribed in the contract *ex stipulatu*, as Roberts on the statute of frauds (note 84) erroneously supposes.

By that statute, the *Bargain and Sale* has different features from the *Emptio venditio*, and the earnest is a part, and not evidence only of the contract; and furnishes the right of action, but not without tender of the price on one side, or of the commodity on the other. *Longfort v. Administratix, of Tyler*, 1 Salk. 113. Hob. 41.

" If a man by word of mouth sells me his horse or any other thing, " and I promise nothing for it, this is void and will not alter the property " of the thing sold. But if one sell me a horse, or any other thing for " money or other valuable consideration, and the same thing is to be " delivered to me at a day certain, and by our agreement a day is ap- " pointed for the payment of the money—or all or part of the money is " paid in hand—or I give earnest money to the seller—or I take the thing " bought by agreement into my possession, where no money is paid, " earnest given or day appointed for the payment, in all these cases " there is good bargain and sale of the thing to alter the property thereof. " And in the first case I may have an action for the thing, or the seller " for his money: (upon tender that is): in the second case I may sue " for and recover the thing bought: in the third case I may sue for the

"thing bought, and the seller for the recovery of his money: in the "fourth case where earnest is given, we may have reciprocal remedies "against each other: and in the last case, the seller may sue for his "money." Sheph. Touch. of Comm. Ass. 222.

But, notice of readiness to receive the goods, and to pay the price at the time and place agreed on, is equivalent to tender: and will be a sufficient averment to support the declaration: for the terms on each side are concurrent contracts. *Rawson v. Johnston*, 1 East, 203, and the cases therein cited.

Bargain and sale may be rescinded by mutual consent before the rights of other persons are concerned, but not afterward, *Smith v. Field*, 5 Term Rep. 403.

In *Cooke v. Oxley*, 3 Term Rep. 653. it was determined that though the seller give time to the proposed buyer to deliberate upon the purchase, and the latter within the time agrees to buy, yet, if no consideration intervene, the seller may refuse to sell. The same principle in *Hanson v. Meyer*, 6 East, 614.

See further on this subject, the cases digested by the compilers Sugden, 174. 1 Com. Contr. 83. 89. 90. 2 Com. Contr. 210. *Bailey and Bogert v. Ogden and Ogden*, 3 Johnston, N. Y. Rep. 399, also contains a good investigation of some of the points first above noticed.

The doctrine of sales dependant upon market overt, is not adopted in New-York state, so as to give title to a bona fide purchaser to goods which he bought of A, but which at the time belonged to B, and A had no title to, or right to sell. So that here, where there is no market overt, a bona fide sale does not change the property as against the rightful owner. See Kent's observations in *Wheelwright v. Depeyster*, 1 Johnson's N. Y. rep. p. 479, 480. who cites the civil law maxim, *nemo plus juris in alium transferre potest quam ipse habet; Pothier traite de vente*, part 1. 7. 2 Erskine's Inst. of the law of Scotland, 481. and Lord Kaime's Hist. law tracts. tit. History of Property.

I am not at present aware of any other case on this point, in this country.

In Pennsylvania, by act of 28 May, 1715. § 6. The words grant, bargain, sale, shall be adjudged an express covenant to the grantee, that the grantor was seized of an indefeasible estate in fee, freed from incumbrances done or suffered from the grantor, and also for quiet enjoyment against the grantor, his heirs and assigns. These words however do not amount to a *general* warranty. 2 Binney 95. Lease of *Gratz v. Ewalt.*

I have already stated the civil law, and our law on the general sub-

ject of the sale of chattels, under the Ædilitian regulations. The case of eviction from real property under an ejectment with verdict and judgment in favour of title paramount, is by no means settled by uniformity of decision in this country.

As to the measure of damages to be allowed to a bonâ fide purchaser of land under a warranty, or covenant of seizin in the seller, or covenant for quiet enjoyment, where the purchaser is afterward evicted by title paramount, and where no fraud is alledged against the seller, different courts have considered the subject differently.

Neither in Pennsylvania or in England, has it ever been held that the real owner recovering his possession, was in any way liable to pay for the improvements made on his land. If indeed he lay by, and concealed his title, while those improvements were carrying on with his knowledge, he ought not to recover at all. *East India Company v. Vincent*, 2 Atk. 83 *Anonymous*, Bunb. 53. *Savage v. Foster*, 9 Mod. 37 *Hanning v Ferrers*, 2 Eq. Ca. ab. 357. *Anonymous*, 3 Eq. Ca ab. 522, 523. *Rex v. Inhabitants of Butterton*, 6. Term rep. 554. *Doe on demise of Winckby v. Pye*, 1 Esp. rep. N. P. 364. *Farkes v. Joyce*, Prec. Ch. 7. *Keech v. Hall*, Doug. 22. *Weekly v. Bucknell*, Cowp. 473. I suspect we do not know enough of the circumstances under which the successful owner was held liable to the value of improvements under the civil law.

In England, the measure of damages, was the value of the land at the time when the deed with warranty was executed. For which in our American cases, the following authorities have been cited: Bracton, 384. 19 Hen. 6. 46. a. 61. a. Bro. ab. tit. Voucher, pl. 69. Ib. tit. Recouver in value, pl. 59. 22 Vin. Ab. 144, 145, 146. Ib. pl. 1, 2, 9. Ib. 1, 2, 3. 1 Reeves' history of the English law, 448. Glanville, G. 3. ch. 4. *Bullet v. Bullet*, Godbold, 151.

Such was the determination in New-York; (to wit, that however the land might have risen in value, or whatever improvements the purchaser might have made, yet that) the measure of damages was the purchase money and interest. *Staats v. Executors of Ten Eyck*, 3 Caines, 111. *Pitcher v. Livingston*, 4 Johns. rep. 1. *Morris v. Phelps*, 5 Johns. rep. 49. From this doctrine Judge Spencer dissented, 4 Johns. rep. 18; holding that the purchaser was entitled to the value of the land with the improvements at the time of eviction.

In Massachusetts, *Marston v. Hobbs*, 2 Mass. rep. 407. and *Blackford v. Page*, Ib. 455. Parsons, Ch. J. lays down the old English method of proceeding by vouching the warrantor, or bringing *warrantiæ chartæ* upon the warranty; and declares the law to be, in the pre-

before the court, that the measure of damages was the consideration money paid and interest; that being the amount of the plaintiff's actual loss, who received no estate by the conveyance to him: but gave no opinion what the damages would be, where a grantee actually seized by virtue of the conveyance, was ousted by a paramount title: probably in that case a different rule would obtain. This question afterward came before the court in *Caswell v. Wendell*, 4 Mass rep 108. (Anno 1808) Parker, Judge on the circuit, on covenant for breach of warranty, had directed the jury, that the measure of damages was the value of the land at the time of *eviction*. The supreme court sav, the direction was right; and that the value of the land at the time when the covenant was broken, (to wit, when the conveyance was executed,) as agreed by the parties, was the proper measure of damages: wherein there is something like a dissonance.

That the value of the land at the time of the eviction, is the measure of damages in an action of covenant broken, was also determined in Massachusetts, in *Gore v. Brasier*, 3 Mass. rep. 523.

The same point was also determined in Connecticut, Kirkby's Conn. rep. 3.

The same point was determined in South Carolina, *Liber and Wife v. Parsons*, 1 Bay's, 19. and in *Guerand's Executors v. River*, Ib 265.

Domat also assents to this being the doctrine of the civil law. 1 Dom. 77. sect. 15, 16.

In Pennsylvania, the supreme court have decided in conformity to the New-York cases, in *Bender v. Fromberger*, 4 Dall. rep. 441. An. 1806, which settles the law in this state

In 1804, a case came before me at Chambersburgh, in Franklin county, of the same kind; wherein I charged the jury, that the measure of damages was the improved value of the land, together with the value of such improvements as had been made for the better and more effectual enjoyment of the land itself, as fences, barn, stables, &c. conceiving, that a man being evicted after having spent some of the best years of his life in directing and superintending reasonable and suitable improvements, was entitled to all the increase of value, which was little enough too. So thought the jury, and brought in a verdict accordingly: and the decision was acquiesced in. But in *Glen's Executors v. Washmood*, tried in Cumberland county, 9th May, 1806, the Court (whose opinion was not given till above a twelve month after) adopted the rule in Fromberger's case, and on special verdict whereby the measure of damages was left as a legal point for the court to decide on, directed the average purchase money per acre, with inter-

est from the time of eviction to be allowed for 23 acres, 128 perches, recovered by title paramount. The purchase money was 3*l.* 15*s.* per acre, and the land would have sold at the time of eviction, for four times as much.

Upon the rule of *caveat emptor*, adopted by the English, and some of the American states, all this is just. No man ought to be bound beyond the value he receives for a commodity, valued by the mutual consent of buyer and seller He cannot, it is said, be bound by possibility for £1000, in consequence of selling that for which he receives but a hundred. The answer is, that he ought not to warrant generally that which he is not quite sure belongs to him. Every body who buys in this country, buys with an expectation that his land will rise in value, and is capable of improvement. These are qualities attached to every American purchase; and if a man is induced to spend much time and much money in confidence of the title conveyed to him, and warranted to him, he ought to be remunerated, as I think, at the expence of the negligent or dishonest seller. I do not know a more goodly and comfortable doctrine for the land-jobbers of this country than *caveat emptor*. Doubtless, if the purchaser can taint the sale with fraud, or prove a *scienter* of bad title on part of the seller, the latter would be liable to full damages in covenant, in this state, and to an action on the case for deceit, where the English law prevails. Co. Litt. 384. 1 Fonb. 366. Com. Dig. 236. a. 8. 4 Johns. rep. 1. But how seldom can this be done, in Pennsylvania at least, where a patent itself is nothing more than prima facie evidence of title?

In Virginia, *Nelson v. Matthews*, 2 Hen. and Munford, 164. the same measure of damages is adopted as in New-York and Pennsylvania. (See in that case a discussion of the meaning of the words more or less, in a deed.)

De emptione pura. 271.

In iis autem.] *vid. Cod.* 4. *t.* 21. *De fide instrumentorum.*

By the civil law all covenants of sale were good, whether written or unwritten, to whatever value they extended. But in *England*, it hath been enacted by 29 *Car. cap.* 3. *sect.* 17. "That no contract for "the sale of any goods, wares, and merchandize for the price of "pounds sterling or upwards, shall be allowed to be good, except the "buyer shall accept part of the goods so sold, and actually receive the "same, or give something in earnest to bind the bargain, or in part "of payment, or unless some note, or memorandum in writing of the "said bargain be made and signed by the parties to be charged by

"such a contract, or their agents thereunto lawfully authorized." 29 *Car.* 2.

§ 1. *De pretio certo.* p. 272. *Sed nostra decisio.* Cod. 4. 38. 15.

§ 2. *In quibus pretium consistat.* p. 273. *In nostris digestis.* Dig. 18. 1. *De contrahenda emptione*

§ 3. *De periculo et commodo rei venditæ*, p. 274. The doctrine here laid down as to the purchaser bearing the risk, is acknowledged in *Phillimore v. Barrey*, 1 Camp. N. P. Rep. 513. Sugd. L. of Vend. and Purch. 176. 177.

Tit XXV. De locatione et conductione, p. 276 This contract is more extended than our letting and hiring; including as in the next section, a *quantum meruit*, for work and labour.

§ 1. *De mercede collata in arbitrium alienum.* p. 276.

Actio prescriptis verbis. p. 277 *Dicta est actio* PRESCRIPTIS VERBIS, *ex eo quod prescriptis verbis rem gestam demonstrat. Ob eandem quoque causam, hæc actio dicitur* IN FACTUM; *et interdum plena oratione* ACTIO UTILIS PRÆSCRIPTIS VERBIS IN FACTUM. Vinn.

§ 3. *De emphyteusi.* p. 277.

Emphyteuseos contractus. An *emphyteusis* (from φυτευω to plant) is a contract made by consent, by which houses or lands are given to be possessed forever, or at least for a long term, upon condition, that the land shall be improved, and that a small yearly rent or pension shall be paid to the proprietor. And this pension, rent, or canon, may be paid in money, grain, or any other thing. The perpetuity, or long term, granted, distinguishes this contract from letting and hireing: for an *emphyteusis* was originally made on account of barren lands, which no person would take for a short time, through a fear of the charge of cultivation; but afterwards the best lands were often granted out upon this emphyteutical contract; the nature of which was first fixed by the emperor Zeno, who determined it to be a distinct contract from buying and selling, letting and hireing. vid. Cod. 4. t. 66 *De jure emphyteutico.* For some thought it to be the contract of hireing, when they considered, that a rent was paid for it to the proprietor; and others imagined it to be the contract of buying, when they saw the tenant had a perpetuity, or at least a very long time, and a sort of property in it: but the tenant had only *utile dominium*, not a direct dominion; and therefore the contract was distinct from buying and selling.

The tenant is called *emphyteuta*, being under an obligation to plant and improve the land: and he has such an interest, that he may sell the profits of his right in the estate to another, with the consent of the

proprietor, to whom two months must be allowed to determine whether he will himself become the purchaser. But, when there is a new tenant, a *laudimium*, (which is almost the same as a relief, and generally amounts to the value of the 50th part of the estate,) must be paid to the proprietor by the new tenant, as an acknowledgment for being put into possession. Cod. 4. t. 66. l. 3.

There is also a pension or rent called a *canon*, which must be paid annually, as an acknowledgement of a superior title; and this *canon* is always due every year, whether the tenant receives any profits or not: for it is not paid, in consideration of profits received, but as an acknowledgment of the tenure.

The *emphyteusis* of the Roman law seems to have given rise to our fee-farm and copyhold estates in England. Harris.

§ 4. *De forma alicui facienda ab artifice*, p. 288. This section seems intelligible only on the supposition, that the labour of the workman is considered as let out by him, and hired by his employer. Hence, *Hesketh and Blanchard*, 4 East, 144. where, a man contracts to give another half the profits of a concern for managing it, would be a *Locatio, Conductio*, as well as a partnership.

Tit. XXVI. De societate, p. 280. As to the general doctrine of partnerships, and sleeping partners, see *Coope et al. v. Eyre, et al.* 1 Hen. Bl. 37. and *Waugh v. Carver, et al.* 2 Hen. Bl. 235. in which cases the civil law doctrine of partnership, is also touched upon, as to what constitutes partnership. See to the same purpose, *Bond v. Gibson*, 1 Campb. N. P. Rep. 185. *Dry v. Boswell.* Ib. 329. *Wist v. Small*, Ib. 331. N. *Alderson v. Pope*, Ib. 404. N. *Peacock v. Peacock*, 2 Camb. N. P. Rep. 45. *Guiden v. Robson*, Ib. 302. *Neersome v. Coles*, Ib. 544. *Barton v. Harrison*, Ib. 97. 2 Taunt. 49.

The French *Commandite*, where a party in a concern is liable only in respect of the share he brings into partnership, is not known in England. But it appears to be introduced in the banking establishments of this country; with what legal success is yet some what dubious.

Commandite, sometimes signifies partnership, where one advances money, and the other skill. *Expte. Garland*, 10 Vez. 114. from the Dictionaire de l'Academie Francoise.

§ 8. *De cessione bonorum*, p. 283.

See on the effect of *cessio bonorum*, Expte. Burton, 1 Atk. 255. *Ballantine v. Golding*, Cooke's B. Law, 522. *Warring v. Knight*, Ib. 524. *Quin v. Keefe*, 2 H. Bl. 553. *Robinson v. Bland*, 1 Sir W. Bl. 256. 2 Burr. 1078. *Mulloy v. Barker*, 5 East, 319. *Hunter v. Potts*, 4 Term Rep. 182. *Sill v. Worswick*, 1 Hen. Bl. 665. *Smith v. Buchanan*, 3

East 6. *Folliot v. Ogden*, 1 Hen. Bl. 123. *Potter v. Brown*, 5. East, 124. *Cornelius Van Raugh v. John Van Arsdaln*, 3 Caine's N. Y. Rep. 154.

The cases under the insolvent debtors acts, of New York state, are of such frequent occurrence, that I must decline a reference even to their names, referring to the indices in Caines and Johnson.

In Pennsylvania see *James v. Allen*, 1 Dall. Rep. 188. *Miller v. Hall*, 1 Dal. Rep. 228. *Thompson v. Young*, 3 Dal. Rep. 294. *Gorgerat v. Murray*, Ib. 366. *Harris v. Mandeville*, 2 Dall. Rep. 256. *Emory v. Greenough*, 3 Dall. Rep. 369. *Baker's case*, 1 Binn. 462. *Croxall's case*, Ib. 589. and as to the mutual operation of *cessio bonorum*, *Smith v. Brown*, 3 Binn. 201. confirming, *Donaldson v. Chambers*, 2 Dall. 100. and *Miller v. Hall*, 1 Dall. 228.

If defendant pleads a discharge as a certificated bankrupt, in a foreign country, he must prove that the cause of action arose in that country, *Green v. Sarmiento*, April Sessions, 1811, Coram Washington, in Philadelphia.

The mode of distributing an insolvent's estate in Virginia, will be found in *Anderson v. Anderson*, 1 Hening and Munford, 12. and *Finsley v. Anderson*, 3 Call's Rep. 329.

As to the effect of the insolvent laws of Virginia, on the future property of the debtor (which is not protected by those laws.) See *Payne v. Dudley*, 1 Washington, 198.

On the effect of the insolvent laws of Maryland, see *Reily v. Lamar*, 2 Cranch, 344. On the effect of the prior lien of the United States, see *M'Lean v. Rankin*, and Heyer, 3 Johnson's N. Y. Rep. 369. and *United States v. Fisher et al.* 2 Cranch, 358. and *United States v. Hooe*, 3 Cranch, 73.

In the Massachusett's Reports, in Bays, and in M'Henry. I can find nothing of moment to the present purpose.

In *Simms v. Slacum*, 3 Cranch, 300. A discharge under an insolvent law obtained by fraud, was decided to be *a discharge in due course of law.*

§ 9. *De dolo et culpa a socio præstandis*, p. 283. See on this subject the case of *Thompson and Hipgrip v. Frere*, 10 East, 418. The American editor has added a note to this case, including the American decisions on this point up to 1810.

Tit. XXVII. De mandato, p. 284. This title has reference to the general principles of the prolific head of powers; which is too extensive to be treated here. I must refer to Powel, and the Chancery decisions on this subject since his book. If the person empowered, is

paid for his services, the contract is not *mandatum*, but *locatio conductio*

§ 13. *De mercede*, p. 288. This is another instance wherein the hire of the labour and service of another, whatever is to be performed, is ranked under the *locatio conductio* of the civil law.

Tit. XXVIII De obligationibus quæ Quasi ex contractu nascuntur, p. 289. These are obligations that arise on account of services rendered for a person, without his express command or direction. As when one manages the affairs of an absentee, for his benefit, without his knowledge: *negotiorum gestio:* which gives the action *negotiorum gestorum*. 2dly, Guardianship: *tutelæ administratio*. 3dly, When business is transacted for common benefit by one joint tenant, tenant in common, or co-partner. *Communio bonorum*. This is connected with the actions, *familiæ erciscundæ;* and *de communi dividundo;* which being for common benefit, the expences are proportionably divided. 4thly, *Judicium finium regundorum*, under the laws for keeping up common fences, and boundaries. 5thly, *Aditio hæreditatis*, by which the heir is bound to pay the legatees; who cannot be said to have any contract, either with him or the deceased. Though the creditors have. 6thly, *Solutio indebiti*, where money is paid by mistake; of which I have treated in speaking of the action *de condictione indebiti*, or money had and received. See also Cod. 4. 5. hoc. titulo.

The money must not be due: and it must be paid by mistake, not knowing the circumstances; otherwise it is tantamount to a gift. Dig. 12. 6. 1—12. 6. 24—12. 6. 26—12. 6. 62—12. 6. 52—12. 6. [illegible]—50. 17. 53. This quasi contract, includes our action of trover, as to its form. If money be unlawfully *paid*, as to a woman with intent to seduce her; it cannot be recovered. If it be unlawfully *received* by duress, fraud, or extortion, it may be recovered. If unlawfully *paid and received*, as the wages of prostitution, bribes, &c. it cannot be recovered. 7ly, By *accidents*, as when a man interferes to repair or prevent some sudden misfortune happening to another: or finds the property of another and recovers it. Dig. 47. 2. 43. 4. So in England, if a man at the moment of necessity relieves a pauper maimed, and who cannot be conveyed safely to his settlement. 8ly, *Fraud* creates a quasi contract in all cases, in favour of the injured party.

§ 6. *De solutione indebiti*, p. 292. See Taunton's Rep. 359.

§ 7. *Quibus ex causis indebitum solutum non repetitur*, p. [illegible] *ante*, *Lib.* 3. *Tit.* 15. § 1. and the notes thereto: and *Haveloch* [illegible] *wood*, 7 Term Rep. 268.

Ex lege Aquilia. Dig. 9. 2. 9. 10.

Nostra autem constitutio. Cod. 6. 43. 2. which puts legacies and trusts on the same footing. But the constitution here particularly referred to, is not extant.

Tit. XXIX. Per quas personas obligatio acquiritur, p. 293.

Quam nostra decrevit constitutio. Cod. 6. 61. 6. cum oportet, &c.

Novellæ constitutionis, Cod. 6. 61. 8.

§ 3. *De servo communi*, p. 294.

Per nostram decisionem. Cod 4. 27. 3. si duo, &c.

Tit. XXX. Quibus modis tollitur obligatio, p. 295.

De acceptilatione, p. 295. This is a verbal discharge or release.

LIBER IV. *Tit I. De obligationibus ex delicto*, p. 299.

§ 1. *Definitio furti*, p. 299. See the case of the *King v. Eggington et al.* 2 Bos. and Pull. 511. wherein it was argued by Clifford, with some appearance of law in support of the position, that it is of the essence of the offence that the articles should be taken *against the will* of the owner; *invito domino.* Bracton de leg. 3. 2. 32. p. 150. b. and the *King v. Donally*, 1 Leach, 232. But surely this may well be presumed, from the taking being fraudulent and without the *knowledge* of the owner. This however tallies with the civil law. See post. § 7. of the present title.

§ 3. *Divisio*, p. 300. *Furtum manifestum*, is the same as when the thief is taken with the *mainour*; or the thing stolen in his hand or possession.

§ 4. *De furto concepto, oblato, prohibito, non exhibito*, p. 301.

Requisitio rei furtivæ. This inquiry after things stolen, was made antiently, *Lance et Licio:* and is noticed in the 12 Tables. Aul. Gell. Noct. Att. Lib. 11. ch. 18. and Lib. 16. ch. 10. With their loins girded with a thin cloth, and a metal plate, dish or shield before their eyes. For they were required to go otherwise naked to search for stolen goods: and the *Lanx* and *Licium* were used lest they should happen to meet women. See 8 Gibb. Rom Hist. 9. 22. I follow him in adopting the explanation of Heineccius.

§ 5. *Pœna*, p. 302. Sometimes corporal punishment was added to the fine: but this was altered by Justinian, Novell. 134. ch. 13. *de pœnarum moderatione.* I fancy it is a general rule that punishments are milder, as knowledge and civilization advance: but this would be a change for the worse, if they were not encreased in certainty on sufficient proof given, as they decreased in severity.

Jonathan Wild, the notorious receiver of stolen goods, was convicted and executed on the clause in 4 Geo. 1 ch. 11. which makes it capital to receive a reward on pretence of helping another to recover

stolen goods, unless he also caused the thief to be apprehended and tried. Hale's Hist. Pl. Cor. 620.

The party robbed may bring his action for restitution, *after* having done his duty by prosecuting criminally; but not before. Hale, P. Cor. 546. See post Inst. 3. § 11.

§ 7. *De affectu furandi*, p. 302.

Si se intelligant id invito domino facere. This with us and in England, would not amount to a criminal offence.

Furtum sine affectu furandi non committitur. Hence with us, we must lay the action as having been done *felonice*, feloniously.

§ 8. *De voluntate Domini*, p. 303. *Per nostram constitutionem.* Cod. 6. 2. 20.

A bare intention to commit a crime unaccompanied by an overt act, was not punishable: *nemo cogitationis pœnam patitur.* Dig. 48. 19. 18. but in England, to solicit a servant to steal his master's goods is an indictable misdemeanour, although the goods were actually not stolen. *The King v. Higgins.* 2 East, 5. So the endeavour to *provoke* another to commit a misdemeanour, as to fight a duel, is indictable; for in these instances there is an overt act. 2 East, 614. *The King v. Phillips.* The case put by Justinian in this section, will be found in *The King v. Eggington, et al.* 2 Bos. and Pull. 508.

§ 9. *Quarum rerum furtum fit*, p. 304. Kidnapping: *Lex Fabia. Plagium: Plagiarii:* manstealing. Dig. 48. 15. 1—48. 15. 3 & 4 & 6. Cod. 9. 20. 7 and 16. 4 Black. Comm. 219. Literary thieves, *Plagiarii*, are noticed by Martial, Lib. 1. Ep. 53. See also Cic. pro Rabirio: and ad Quinctil. I. 2.

§ 11. *Qui tenentur furti: De eo cujus ope, consilio, furtum factum est*, p. 304. This includes the doctrine of accessaries. *Qui hortatus est ad furtum faciendum, non tenetur furti;* is otherwise by the law of England according to the cases quoted just above, under § 8 of this title.

§ 12. *De his qui sunt in potestate*, p. 305. Action of theft was not allowed against children and slaves, on account of the power the master had over them. Dig. 47. 2. 17.

§ 13. *Quibus datur actio furti*, p. 306. Indictment lies for stealing the property *Cujusdam ignoti.* Hale. Hist. Pl. Cor. 512.

§ 18. *An impubes furti teneatur*, p. 308. The only question with us, is, whether the child had sufficient knowledge of the nature of the action he was about deliberately to commit, and that it was a crime. Hist. Pl. Cor. 26, 27. 4 Blacks. Comm. 22, 23. Perhaps no evidence would amount to proof that a child was *doli capax* under seven years of age.

Tit. II. § 1. *Adversus quos datur*, p. 310. *Sit ab omni rapina.* Dig. 4. 2. 13. Cod. 8. 4. 7. Our law against forcible entry and detainer, are founded on similar considerations.

Tit. III. De lege Aquilia, p. 312. This was a plebiscite, proposed by Aquilius a tribune of the people. A. U. C. 572. Almost all the causes of action *damni injuriæ* under the Lex Aquilia, are also the subjects of our action of Trespass on the Case.

A great deal of nice distinction has been employed in ascertaining whether Trespass *vi et armis*, or Trespass on the Case should be brought, for an injury done. See *Bourdon v. Alloway*, 11 Mod. 180.

For some time the criterion was thought to be, whether the act was done wilfully or negligently. *Tripe et al. v. Potter*, and *Ogle v. Barnes*, cited in *Leame v. Bray*, 3 East, 595. At present, the criterion adopted is, whether the injury complained of ensues *directly and immediately* from the act of the defendant, or is only a *consequence* of such act and *collateral* to it, and which might or might not have happened. Thus, I forcibly or carelessly throw, or negligently let fall, or by not securing as I ought I permit to fall, a log into the street; whereby one passenger is wounded, and an hour or two afterward another passenger by stumbling over the log, is lamed. Here, the first man if he sue me, must bring trespass *vi et armis*, and the second man, *Case*.

So, a New England schooner on a West India voyage, was fired into, and her crew so disabled, that unable to proceed on her voyage, she turned back. The owner brought case for loss of freight and profit on the voyage. The Court determined at once, that this was case. *Adams and others v. Hemingway*, 1 Mass. Rep. 145.

The Court of King's Bench, say, the criterion by which we are to decide, is, whether the injury is immediately and directly connected with the action or an accidental consequence only. To which purpose the chief or leading cases are, *Reynolds v. Clarke*, 8 Mod. 272. 1 Strange 638. 2 Lord Raym. 1402; *Scot v. Shepherd*, 3 Wils. 403; *Day. v Edwards*, 5 Term Rep. 649; *Weaver v. Wood*, Hob. 134. *Leame v. Bray*, 3 East 593. where all the cases were considered: this was in 1803. But in *Rogers v. Imbleton*, 5 Bos. and Pull. 117 Anno 1806. Sir James Mansfield, put the Criterion on the point of wilfulness or negligence; and intimated that *Leame v. Bray*, was not settled law. That court did so again in *Huggett v. Montgomery*, Trin. 1807. 5 Bos. and Pull. 446.

The court of king's bench however, decided *Covall v. Laming*, 1 Campb. N. P. Rep. 497. Mich. 1808, according to *Leame v. Bray*: And declared somewhat sharply in *Latan v. Cross*, 2 Campb. N. P.

Rep. 464. Ann. 1810, that they would not permit the principle of *Leame v. Bray*, to be canvassed in a motion for a new trial. The question must be raised if at all, upon the record.

The principle of *Leame v. Bray*, has been recognized in Virginia, *Taylor v. Rainbow*, 2 Hen. and Munf. 423 and in the case before cited in Massachusetts, viz. *Adams et al v. Hemingway*, 1 Mass. rep. 145. In New-York *Vail v. Lewis et al.* 4 Johns. 450. In *Hughes v. Heiser*, 1 Binney, 463. action on the case for a nuisance: held sufficient though the damage was consequential. Judge Blackstone in *Scot v. Shepherd* laid down a very convenient doctrine on this subject, which I think may be considered as law at this day; to wit, that where the injury is *immediate*, plaintiff may bring trespass *vi et armis* with a *per quod* for the consequential damage, *or*, bring case for the consequential damage alone and pass over the immediate injury, 2. Sa W. Bl. rep. 197. which doctrine is like *Pitts v. Gaince*, 1 Salk. 10.

But where the injury is both immediate and wilful, the better way is to bring trespass *vi et armis*. *Leame v. Bray*, *Sup. Ogle et al. v. Barnes et al.* 8 Term Rep. 188.

The difficulty suggested by Le Blanc in *Leame v Bray*, as to cases where vessels run foul of each other, the immediate agent being the winds and the waves, is settled by Lord Ellenborough in *Covall v. Laming*, who very properly states that the helms-man ought to be answerable; that is I presume, in common cases, not in violent storms. See further on this subject *Savignac v. Roome*, 6 Term. Rep. 125. *Mosemus v. Cricket*, 1 East, 106. and *Morley v. Gainsford*, 2 H. Bl. 442. Chitty has also taken some pains on the question in the first volume of his pleadings p. 122. On actions in form *ex Delicto*.

Injuria occiderit. By 33 Ch. 2. ch. 7. treble damages are given for maliciously maiming cattle, destroying a plantation of trees, or throwing down an inclosure.

In eo anno. vid. post. § 9 of this title.

See further respecting actions on the case under the civil law, the last section (16th) of this title, *De actione directa, utili, et in factum*.

§ 1. *De Quadrupede, quæ pecudum numero est*, p. 312. *Neque de Canibus*. By the English and our law, damages are recoverable for wantonly killing a dog, Hale's Pl. Cr. 5. 12. *Townsend v. Wathen*, 9 East, 277. So for wild creatures reclaimed. Ib. and felony may be committed by stealing them. Hawk. Pl. Cr. Lib. 1. ch. 34.

§ 2. *De injuria*, p 313. 24 Hen 8 ch. 10. 1 Hale Pl. Cr. 488.

§ 6. *De curatione relicta*, p. 314. see 3 Bl. Comm. 157. 263. *Sears v. Prentice*, 8 East, 348. where it is held, that an action on the case

lies against a surgeon, not only for negligence, but gross ignorance and want of skill.

§ 9. *Quanti damnum æstimatur, et de hæredibus*, p. 315. The general principle of our law is, that *actio personalis moritur cum persona:* and a bad principle it is. For, if my father was maimed or slaughtered, or my sister seduced, what good reason is there that the offender should escape from damages under this maxim? See post Inst. 4. 12. 1

§ 11. *De concursu hujus actionis et capitalis*, p. 316. If a felon should be pardoned, or be allowed his clergy, or be burned in the hand, he may afterward be sued civilly: 1 Bac. ab. 64. but not pending the Indictment. *Style* 346. Ante tit 2. § 5.

Tit IV. § 1. *Quibus modis injuria fit*, p. 319.

Quasi debitoris qui nihil deberet. See *Page v. Wipple*, 3 East, 314. no action will lie for permitting and suffering the plaintiff to be arrested, after he had paid debt and costs. Malice, is the gist of all these actions. Hence, case does not lie against a plaintiff who brings a vexatious suit, *Pacton v. Honnor*, 1 Bos. and Pull. 205. *Saville v. Roberts* Salk. 13. for plaintiff may be amerced pro falso clamore suo, and is liable to costs.

But it will lie when a man is maliciously sued for a greater debt than he owes, and thereby held to excessive bail. *Daw v. Swaine*, 1 Sid. 424. *Skinner v. Gunton*, et al. 1 Saund. 228. But there must be a *scienter* that so much is not due. *Jackson v. Burleigh*, 3 Esp. Rep. 34. But if plaintiff having no cause of action do not hold defendant to unreasonable bail, the action will not lie. *Neal v. Spencer*, cases in K. B. 257. If A bring this action against B, and prove that B was largely indebted to him on balance, the suit will lie, although A might be indebted in a small sum to B on their running account, *Wetherden v. Embden*, 1 Campb. N. P 295. *Wilkinson v. Mawbry*, Ib. 297. But knowledge and malice must be shewn, *Sebiel v. Fairbain*, 1 Bos. and Pull. 388. *Gibson v. Charters*, 2 Bos. and Pull. 129.

As to Libel, "Libellum aut Carmen aut Historiam." The civil law was very severe against this offence.

A libel was regarded as with us, more serious than slander. The Author, the Transcriber, the Publisher, the Seller, were all liable to punishment, whether it was anonymous or not. Dig. 47. 10. 5 and 29. Cod. 9. 36. abusive pictures, statues, inscriptions, &c. are libellous Dig 47. 10 5. 10. like the case of Philip Thicknesse, wherein the sending a wooden gun to Lord Orwell, was held to be a libellous reflection on his military character. The falsely charging a man with a capital crime was punished even with death. Cod. 6. 36. See the case de libellis famosis. 5 Co. Rep. 125.

I hardly know any subject so important as the liberty of the Press, and the right of discussion. All the difficulties involved in it, relate either to political questions, to religious questions, or to questions respecting private character.

Political questions relate either to the investigation of political Theories, or the examination of the measures of Government, or the character and capacities of our actual rulers. I do not know a plainer position, than this: a government that forbids the investigation of the principles on which it is founded, must feel that they will not bear, (and for that very reason the public good requires) such an investigation. In England, I know of no objection to the temperate discussion of the preference of a republican to a monarchical form of government, when it is not a cover to incite insurrection. No prosecution was set on foot againt the innumerable disquisitions on the inadequacy of parliamentary representation: the republican sentiments of Dr. Price, Dr. Priestley, and Mr. Godwin, were allowed without molestation. In my own case, Sr. John Scott, then attorney general, took a distinction that I had no right to complain of: "continue if you please to publish "your reply to Mr. Burke in an octavo form, so as to confine it proba- "bly to that class of readers who may consider it coolly: so soon as it "is published cheaply for dissemination among the populace, it will "be my duty to prosecute." It was on the same principles that Paine and Jordan were prosecuted for dispersing in a cheap form, the Rights of Man. A defensive measure on the part of government, certainly excusable, probably justifiable. In this country, a defence of monarchical government would be borne with less patience, than a defence of republics in England. But if the manner be decent and temperate, such discussions ought to give offence in neither country: but if in either country they should be merely the cover for exciting to civil commotion, let a jury judge of the intent, and the author, and publisher proceed at their peril.

So in discussing the actual measures of a government, or the capacities of those who direct it, the temper and manner of the discussion, will always furnish a clue to the design of the author. It is a farce to talk of freedom in a country, where the public characters and public conduct of public men, are shielded from investigation. Hence the injustice, the absurdity, the tyranny of the sedition law under the administration of the president Adams. There should be no *previous* restrictions on the press. The public are deeply interested in having every public measure, and every public character, sifted to the bottom. The people are deeply interested that such investigations honestly

conducted, should incessantly take place. But if the charges be founded on falsehood or forgery, if there should be groundless insinuation of base and unworthy motives, or needless and malignant attacks upon private character, under cover of public dicussion, let the hand of justice fall heavy on the offender. The only way to preserve the liberty of the Press, is to punish its prostitution.

Hereon it may be observed, that the doctrine advanced by judge Chase (a man of admirable talent, but whose political opinions from the bench, were neither dictated by wisdom or by virtue) is strongly to be reprobated. Namely, that a political writer should be prepared with legal proof of every fact he means to advance, before he publishes. It was a doctrine calculated, as he well knew, to prohibit all political discussion whatever.

No man will venture to publish, who is required before a court in Massachusetts, to prove that the Sun shone at mid day in South Carolina; or that Mr Pickering, with the knowledge of Mr. Adams, wrote to judge Bee on the case of Jonathan Robbins, previous to the Trial. In political prosecutions, a defendant ought to be allowed to introduce whatever evidence he pleases of the facts he has published, and submit it (not to a court guided by the technical rules of evidence, as to meum and tuum, but) to the jury, whether it was reasonably sufficient to justify the assertion in the extent to which it was made. In writing upon popular and public facts, popular documents and common fame may fairly be resorted to, provided the mode of stating the fact be commensurate with the proof relied on. Indeed no writer ought to be called upon for proof of such facts, till they are denied upon affidavit.

The president Adams, was not singular in wishing the sentiments of government to be communicated to the judiciary on a political question. That has been done in England during Mr. Pitt's administration, and since: at least the particulars detailed in a public paper as matters of notoriety, have not to my knowledge been denied. In fact, what individual or what set of men does not feel averse to be dragged before the tribunal of public opinion, in cases where they feel conscious of misdeed? But in that country, the high character and station of the judges, and the great confidence so universally (and a few instances excepted) so deservedly reposed in them, and the attention due to the opinion of the bar, as well as of the bench—form a public safeguard of great practical importance: a much more efficacious one, than the farce of a written constitution in this country; which every party, bold and unprincipled in proportion to its ignorance, construes and misconstrues, uses and abuses, as the temptation of the moment may happen

to dictate. Self-preservation, the first law of our nature, will always raise the arm of power, where it can descend with impunity and effect: but if in England as well as in this country, interferences on political questions now and then take place, which neither law nor right can fully justify, that country at least does not tolerate in any formidable extent, the abominable nuisance so prevalent here, of tying up to the stake, the private character and domestic life of every political opponent, to be exposed to the calumnies of the vulgar, and worried by every mongrel description of slanderers and libellists. Yet the public taste of this country seems gratified by the practice; whereas the intermixture of personal slander with public discussion, ought to be regarded as full and complete evidence, that the writer was not actuated by motives of public good. Among the antient Democracies of Greece, every man of superior station, wealth, talent, or character, was considered as a fair object for popular calumny: from which, no public or private virtue could effectually shield him. This was carried to a prodigious excess: nor can any man peruse the history of those turbulent republics, without strongly feeling that the character of their governments, was to the people themselves, a character of cruel, unfeeling, insolent injustice; of ferocious and ambitious rapacity; and a morbid jealousy of the most honourable evidences of superiority, that furnish little cause for regret, if such democracies be extinguished to flourish no more.

In New-York and some other of our states, something like [illegible] this subject still holds its place in public estimation: but every where there is too much rancorous abuse of every political opponent, and the most flagrant imputation of corrupt and sinister motive on grounds too slight for a cool observer to consider of any weight. Almost every where among us, the antient hatred, not merely to the aristocracy of rank, and the aristocracy of wealth, but to the aristocracy of talent also, strongly prevails; and the licentiousness of publication almost universally indulged in, renders it doubtful, whether the Freedom of the Press itself, may not be purchased at too high a price.

In this state, the dread of infringing on personal liberty has been carried to a morbid extent; in so much, that in many cases of injury, even the verdict of a jury will afford neither present compensation nor future security. An insolent or unprincipled disturber of the public peace or domestic intercourse, seduces your wife, debauches your daughter, maims your person, or defames your character. You put yourself to the trouble and expence of suing him for the injury committed: the jury find a verdict against him, and allow you a compensation in

damages. He goes to jail for a week or two, applies for the benefit of the insolvent act, is discharged from prison, and laughs in your face.

You indict him for the offence: and he is convicted. But he is a noisy partizan of the prevailing politics whatever they may be. His fellow brawlers send round a petition; the Governor is urged by political adherents, a pardon puts an end to the punishment, and the insolvent act, pays the costs.

There is no reply to be made to the arguments in favour of Republicanism over Monarchy: in theory they are triumphant. But in practice, there are objections that may give occasion to a considerate man to pause: especially, where under the influence of universal suffrage, the ignorance of the community is almost exclusively represented, and wisdom and wealth, are held in equal distrust.

With respect to religious discussion, long experience has now shewn, that the less opposition is given, the more peaceably such controversies proceed, and the less mischief they produce. Complete toleration on the part of the government, and the laws, is the parent of mutual toleration among the people. The more the public is accustomed to dissonance of opinion on these subjects, the more clearly will it be seen, that a man may be a good child, a good father, a good husband, a kind friend, and a good citizen, under any and every system of religious faith, however rigid or however lax: and if a man possesses these qualifications, it is all that society can require. Nor is it easy to draw the line between questions of this description which shall be included, or those that shall be excluded from the Index expurgatorius: every man will be apt to consider his own creed, as all-important to society; and experience will consider none of them as of consequence, except as they tend to make a man a good citizen in the points above mentioned; and each stands forward with similar pretensions in this respect, and perhaps with nearly equal merits.

On the subject of private character, I have said sufficient. It is *never* attacked from the press with a *good* motive. If the statements be true, the laws are open for conviction, and punishment: if dubious, they ought not be advanced; if false, the calumniator ought himself to be considered as a public nuisance. The absurd privilege of giving the truth in evidence on an *indictment*, only encreases the mischief, and gives a legal sanction to the practice itself. In a *civil* action, the first principles of justice require that a man shall not ask for damages for calumny, of which he is afraid to meet the proof.

I shall not dwell upon the Law of libels in England, which may be well gathered from the popular compilations: but it may be useful to notice the principal cases that have occurred here.

By an act of Pennsylvania of 16th March, 1809, which if not renewed will expire by its own limitation in April, 1813, the truth is allowed to be given in evidence on every prosecution for libel. I believe this doctrine is adopted no where but in this state, and in New-York state, nor ought it to be. The public have nothing to do with the truth or falsehood of a libel on a private individual. Has he been guilty of a crime? Indict him. Otherwise it is reasonable to conclude, that your own bad passions give rise to the publication.

The cases of libel hitherto reported in the U. States, so far as I have met with them, are mostly conformable to the principles of the English decisions.

1 Binney, 393. *Kennedy v. Lowry.* It is sufficient to lay the *substance* of the words spoken, and prove it.

1 Binney, 601. *Respub. v. Duane*, in which the above mentioned act of Assembly, was held to put an end to an indictment for libel, commenced before that act passed.

2 Binney, 34. *Brown v. Lamberton.* Words are to be taken according to their plain and obvious meaning.

2 Binney, 514. *Respub. v. Sharf*, wherein judgment was reversed, in consequence of the finding of the Jury not corresponding to the indictment.

Green v. Long, 2 Caines, 91. "He is perjured." It is sufficient to prove that the words were spoken of the plaintiff, in allusion to an oath taken in court. If the court was incompetent to administer it, Defendant must shew this.

The *People v. Freer*, 1 Caines, 485. The intent of a writer of a libel on the court, is of no consequence, if the court are of opinion it is a libel.

Lyle v. Clason, 1 Caines, 581, sending a sealed libel to the plaintiff is not a publication, sufficient to ground a *civil* prosecution: but it was a criminal one. *Hicks case*, Poph. 139.

Clason v. Gould, 2 Caines, 47. In libel there must be affidavit of special cause to hold to bail. Nor will the court change the Venue on the common affidavit, *Clinton v. Croswell.* 2 Caines, 245.

Foot v. Tracy, 1 Johns. Rep. 46. Can defendant give in evidence on the general issue, the general character of the plaintiff in mitigation of damages?

Hotchkiss v. Lothrop. 1 Johns. 286. A libel by the plaintiff on the defendant, may be given in evidence in explanation, but not in justification.

Tillotson v. Cheetham, 3 Johns. 56. Judgment by default, after

the fact of publication and the truth of the inuendoes. Nor can defendant give a former recovery in damages by the same plaintiff in mitigation, although it was for part of the words charged in the second suit. The one publication being on the 3d, and the other on the 17th of the month; and they might go into different hands.

Clinton v. Mitchell. 3 Johns. 144. If defendant gives notice of certain facts on which he means to rely, he shall not withdraw that notice, unless on affidavit that the facts so stated, are stated without sufficient grounds. This is founded on the practice of New-York state, where defendant may plead the general issue to this action, and give notice of special matter to be used in his defence.

Lewis v. Few. 5 Johns. 1. *U. States*, is sufficient to support *United States.*

It is no justification that Defendant signed the libel as Chairman of a public meeting.

Whether the plaintiff was the person meant to be libelled, is a question of fact for the jury. *Van Vechten v. Hopkins.* Ib. 211.

Witnesses are not admissible to prove that on reading the libel they understood by it that the plaintiff was the person meant. An inuendo cannot be proved; but extrinsic matter introduced by an averment or colloquium may be proved.

Where one count is bad for want of sufficient averments, and entire damages assessed on the whole declaration, judgment must be set aside. *Cheetham v. Tillotson*, in error, 5 Johns. 430. Sed vide, *Kennedy v. Lowry*, 1 Binney, 397. *Neal v. Levis*, 2 Bays, 204. and *Nelson v. Emerson*, 2 Bays, 439.

A petition of divers inhabitants to the authority under which a district attorney is appointed, and by which he may be removed, charging him with improper motives of conduct, is not a libel. *Thorn v. Blanchard in Error.* 5 Johns. 508 The English authorities are well considered in this case, and the cause was decided in error against the opinion of the law characters on the Bench. The Court of errors in New York consisting of the Chancellor, and of senators who are not lawyers.

Thomas v. Rumsey, 6 Johns. 26. One satisfaction for one injury. B and C being partners in a newspaper, A brought suit against B for libel: and then against C: against whom he recovered. B pleaded this recovery *puis darein continuance*, and well: *Genet v. Mitchell*, 7 Johns. 120. Plaintiff may abandon one count of his declaration, and use the libel therein stated but abandoned, in *explanation of another count.* A jury may decide under the circumstances, whether a pub-

lic minister publishing his instructions, has thereby traitorously betrayed the secrets of his government.

Andries v. Wills. Ib. 261. Action for libel lies against the proprietor of a Gazette, edited by another, though the proprietor did not know of the publication.

But where the proprietorship is cast upon a person by operation of law, he does not become thus liable.

Thomas v. Croswell. Ib. 264. To publish of a member of congress that he is a fawning sycophant, and has abandoned his post in pursuit of office, is libellous: and of this, the jury may decide.

Quere, whether words charged in the declaration, and in themselves libellous, can be admitted to shew malice in other words relied on? *Meade v. Daubigny*, Peake's N. P. Ca. 125. A man may publish a plain and fair account of proceedings in a court of justice, but not accompanied with comments and insinuations against the characters of the parties concerned.

Brooks v. Bemiss, 8 Johns. 455. Defendant stated that this was not the first time that falsehood had been associated with the plaintiff in the minds of many honest men. Evidence that seven persons and others, believed the plaintiff not to be a man of truth, is not admissible: for it leads to vague and additional calumny. The fact of falsehood must be proved.

Commonwealth v. Crips, 4 Mass. Rep. 163. The truth of the matter is no justification in a criminal prosecution for libel.

I find nothing to the purpose in 5 and 6 Mass. Rep. in 1 M'Henry 1 and 2 Washington; 1, 2, 3 Call; 1, 2, 3 Henning and Munford; or 1—6 Cranch. But lately, (21 Jan. 1811) it was decided in the supreme court at Charleston, S. C *The State v. Thomas Lehre*, that the truth of the libel could not be given in evidence on an indictment. Judge Waties, in delivering the opinion of the court, cites the second section of the institutes. *Shaw v. M'Combs*, 2 Bays 232. Verdict in order on Sunday void. Sunday is not dies juridicus.

Sive quis matrem familias aut prætextatum prætextatamve adegerit fuerit. The same law in *Rigaut v. Gallisard*, 7 Mod. 78. It is strange how slightly the crime of pæderasty was regarded among the ancients. Virgil's *Formosum, pastor Corydon ardebat Alexin*, and his *Nisus amore pio pueri*, are instances. A quarrel between two men about a youth, is also the subject of one of Lysias's orations, containing a remark in disfavour of the practice.

§ 2. *Qui et per quos injuriam patiuntur*, p. 320.

So a husband may have assault and battery against one who

mits adultery with his wife, though with her consent. 7 Mod. 81. per Holt.

8 Mod. 26. *Read v. Marshall.* Husband alone may have an action for beating his wife. But husband and wife cannot join in an action for battery on them both. They may join for battery committed on the wife alone; for the damages in this last case survive to the wife. *Newton et ux. v. Hutter*, Lord Ray. 1208. *Hoffin v. Byles*, 1 Sid. 387. In an action for negligence, whereby plaintiff's wife was killed, he is not entitled to any damages for the loss of her society, or for his mental sufferings on her account, after the moment of her death. *Baker v. Bolton, et al.* 1 Campb. N. P. Rep. 493.

Damages beyond the mere loss of service giving for debauching plaintiff's daughter. *Irwin v. Dearman*, 11 East, 23. In such an action the daughter cannot be a witness to prove a previous promise of marriage in aggravation of damages, for she has a right to her own action for breach of that promise. *Foster v. Scofield*, 1 Johns. N. Y. Rep. 297.

§ 7. *Pœna injuriarum ex* 12 *tabulis* p. 321. Aulus Gellius, Lib. 20. Ch. 1. says that retaliation was never enforced, in as much as the punishment might be commuted for money. The law of the 12 Tables according to him was, *si injuriam faxit alteri* 25. *œris pœnæ sunto.*

§ 8. *De lege Cornelia*, p. 322. Passed under Sylla: *Lex Cornelia de injuriis.* See Dig. 47. 10. 5.

§ 9. *De æstimatione atrocis injuriæ*, p. 322. The *Locus injuriæ*, is recognized also by the English law, in the doctrine of Mayhem, the Coventry Act, &c. See also 5 Hen. 4 Ch. 5. and 22 and 23. Ch. 2. Ch. 1.

§ 10. *De judicio civili et criminali*, p. 323. *Zenoniana constitutio;* See Cod. 9. 35. 11. and 12. 8. 2. *ut dignitatum ordo servetur.*

Tit. V. De obligationibus quæ ex quasi delicto nascuntur, p. 324. *Si judex litem suam fecerit.* The judge below was liable to damages in such a case. Dig. 50. 13. lex ult. *De var. et extraor. cognit.* and Cod. 7. 49.

Judges of courts of record are not liable to actions, on account of their decisions. See *Yates v. Lansing*, 5 Johnson's N. Y. Rep. 282.

§ 1. *De dejectis vel effusis*, &c. p. 324. Dig. 9. 3. 1. This section includes our law respecting nuisances that work injury to individuals. If damage was apprehended only, there was a writ, *nuntiatio novi operis*, or *Cautio de damno infecto.* Dig. 39. 1. 1. 1. and 17—39. 1. 5. 3. and 30. 2. 2. and 4. 3.

§ 3. *De damno aut furto*, &c. p. 325. An Innkeeper is liable if he be,

1st. The keeper of a common Inn. *Mason v. Grafton*, Hob. 245.

2. To a guest or traveller, using the house as an Inn. *Calye's case*, 8 Rep. 32.

3. And received as such by the Innkeeper, *Bird v. Bird*, 1. And. 28. Anon. Moore 78. *Bennet v. Mellor*, 5 Term Rep. 273. Dig. 49. 7.

4. Provided the loss happen, by the act or neglect of the Innkeeper, or his servants. *Calye's case*. Co. Rep. Ub. Sup.

5. Respecting goods deposited in the house. Ib.

6. But not if the Innkeeper requests and enables the traveller to keep them under lock and key, and he omits so to do. *Brand v. Gee*, Moore, 158. Dyer 206.

7. Where the Innkeeper receives no profit, he is liable to no risk. Dig. 4. 9. 3. 2: as if a traveller leaves his trunk, and promises to come again at a future day. *Gelley v. Clark*, Cro. Jac. 188.

But this does not relate to a short absence for an hour or two: or to a horse, by which profit is made. *Sandy's case*, Cro. Jac. 189. *York v. Grindestone*, 1 Salk. 388.

8. Nor is it an excuse that the Innkeeper is sick: for he ought to keep servants. *Cross v. Andrews*, Cro. El. 622.

9. The liability does not extend to a personal injury, done to the guest.

10. A master may bring this action, if his servant was robbed at the Inn, of goods belonging to the master. *Beedle v. Morris*, Cro. Jac. 224. Yelv. 162. *Drope v. Thayne*, Noy 79. Popham 179.

By the civil law, if the loss happened by means of the Innkeeper or his servants, the action brought on double damages: but if done by a stranger, the damages were single only. Dig. 4. 9. 8—47. 5. 6.

Tit. VI. De actionibus, p. 326. § 1. *Divisio prima*. p. 326.

Judices, arbitrosve. The *Judices* decided upon actions *stricti juris*, the *Arbitri*, upon actions *bonæ fidei*. The referees chosen by consent of the parties, were sometimes called *Arbitri*, but more properly *Compromissarii*.

§ 6. *De recissoria*, p. 329. Cod. 8. 51. 18. See the acts of Parliament protecting the rights of absentees. 5 Hen. 4. ch. 14. 4 Hen. 7. ch. 24, &c. Co. Litt. sect. 436—440. Continual claime. Heir[illegible]

§ 6. *De Pauliana*, p. 330. This is the principle of the English law against secret conveyances to defraud creditors, 13 Eliz. ch. 5. [illegible] the cases illustrative of this statute, see Roberts on fraudulent conveyances, and the references in Cooper's bankrupt law, 144—151.

How far a voluntary conveyance, of a debtor's property for the benefit of his creditors generally, or of such as will assent to the deed, is valid, does not appear to me as yet completely settled under all its distinctions, either in England or here.

An assignment of all a trader's effects and property, is an act of bankruptcy; though for the general benefit of the creditors. 2 Vez. Sen. 19. *Clavey v. How*, Burr. rep. 476. 829—833. 2241. Sir W. Bl. rep. 1862. Bull. N. P. 40.

In *Eastwick v. Caillaud*, 5 Term. rep. 420. a deed of part of a debtor's property to certain creditors was held good, where there was no fraudulent intent, and where the other property remained.

Inglis v. Grant, 5 Term. rep. 630. a deed in trust for the benefit of creditors made in India, was supported, and declared not an object of the bankrupt laws in England. So in *Alexander v. Vaughan*, Cow. 402 an act of bankruptcy committed abroad, cannot be a foundation for a commission at home.

But in *Eckhardt v. Mellish*, 8 Term rep. 142. the court said that an assignment by deed, by traders of all their effects, unless all their creditors concurred, was not only fraudulent and void as against creditors who did not concur, but was an act of bankruptcy. So in *Eckhardt v. Wilson*, 8 Term rep. 140. *Tappenden v. Burgess*, 4 East, 232.

In *Nunn v. Wilsmore*, 8 Term rep. 521. the deed of all the effects was supported, because there appeared to be a solvency.

Meux v. Howel, 4 East. rep. 1. the transaction was supported, being honest and well intended for the common benefit of creditors, though some of them might be delayed.

Burd v. Smith, *Lessee of Fitsimmons*, however, 4 Dall. 76. has decided in Pennsylvania that a voluntary conveyance made bonâ fide in favour of such creditors as would accede to the terms of it within nine months, was good Something like the same principle was also held in *Wilt v. Franklin*, 1 Binn. 502. But in *Bown's executors v. Burrell*, Ann. 1751, and *Hovey v. Clark*, 1788, Root's rep. 252. a general conveyance of all a man's interest for the benefit of his creditors, was held fraudulent and void as against those who did not agree to it. See also *Leech v. Leech*, 1 Ch. cases, 249.

§ 7. *De Serviana et quasi Serviana seu hypothecaria*, p. 330. The first part of this section, is in principle the same as our suit for rent. The last part is the foundation of maritime hypothecation and bottomry.

The Servian action was introduced by the Prætor Servius, in Cicero's time. The quasi Serviana, by subsequent prætors, or the prac-

tice of the bar. The Servian action, was a prætorian, real, action; given to landlords, for the recovery of rent of farms, *Prædia rustica*; not for the rent of houses, *Prædia urbana*. It lay against the property whereon by previous contract, the landlord had a lien for rent in arrear, but the tenant kept the possession and use of it. The lien held good, in whosesoever hands the property was found. *Tribuit enim hæc constitutio domino fundi jus in re quod cum re ambulat, et semel quæsitum perpetuum est nec mutatione dominii extinguitur.* The property might be redeemed by tendering the demand.

Hypotheca, means sometimes the right of the Pawnee, and sometimes the thing pawned or hypothecated, as in the digest and code, *de pignoribus et hypothecis.* Dig. 20. 1.

A pledge, requires delivery of the article into the possession of the creditor: an *hypothecata*, is the subject of contract only, and remains with the debtor; but is liable to the lien of the creditor in whosesoever hands it may be found. Dig. 20. 1. 2. 2. sometimes the contract was tacit. Dig. 20. 2. 4. and 20. 2. 7.

The action for a pledge was *pignoratitia*: it was a civil action: *hypothecaria*, was a prætorian action. Pignoratitia, was personal, hypothecaria, was real. Pignoratitia, lay against the creditor, holding the pledge when the debt was paid. Hypothecaria, lay against the article subjected to lien by the contract, to compel the payment of the debt. Pignoratitia lay, though the pledge did not belong to the debtor, for it was grounded on his delivery to the creditor, who was bound to retain it no longer than till payment. Hypothecaria, could not be supported in rem, if the thing hypothecated by the debtor, did not belong to him.

Hypothecation, was subject to limitation of suit: viz. it was to be brought within 30 years, against a possessor malâ fide: 10 years if bonâ fide: and 20 years in cases of absence.

§ 8. *De actionibus prætoriis personalibus*, p. 331. *Receptitia.* An action to recover money deposited with a banker.

Ex nostra constitutione, Cod. 4. 18. 2.

§ 9. *Actio de constituta pecunia*, p. 331. Dig. 13. 5. 1 and 14. A personal prætorian action, founded on a promise, or a contract, *constitutum*, to pay what might be due from the proprietor himself, or any person for whom he chose thus to become guarantee.

§ 11. *De actione in factum ex jure jurando*, p. 332. This is somewhat like the ancient practice of compurgators, or modern practice of swearing in this country to a book account.

§ 13. *De prejudicialibus actionibus*, p. 332. These are actions, as

Bracton says, (who describes them in the same manner, L. 3. ch. 4. n. 9.) *Præjudiciales, quia prius judicantur quam actio principalis.*

§ 15. *De nominibus actionum*, p. 333. *Condicere, prisca lingua significat denuntiare; nam qui olim cum aliquo litem habebat, denuntiabat ei,* UT ILLO DIE AD JUDICIUM ACCIPIENDUM ADESSET. *Hodie vero per abusionem, condictio, dicitur actio quam actor intentans dicit,* SI PARET HUNC DARE OPORTERE. *Nulla enim hoc tempore adversario fit denuntiatio. Theoph. in loc.* Sir W. Bl. rep. 391. *Price v. Neal:* this is the action *condictio indebiti*, for money had and received.

§ 16. *Divisio secunda*, p. 334. The first part of the division, is our action in *detinet.*

§ 20. *De mistis*, p. 336. *Herciscere*, an old word meaning to divide, from ἕρκος, a hedge or inclosure. Cic. de orat. l. 1. Heins. syntag. l. 3. tit 18. The writs in England that answer the purpose of the *familiæ erciscundæ*, the *de communi dividundo*, and the *finium regundorum*, are the writs *de partitione faciendâ—de rationalibus divisis—de perambulatione faciendâ—le curia claudendâ—de reparatione faciendâ.* Fitz. nat. brev

§ 21. *Divisio tertia*, p. 336. In some actions in England, double and triple damages are given: and by 38 Ed. 3. ch. 12. tenfold damages are recoverable against a juror who receives a bribe for bringing in a verdict.

§ 25. *In quadruplum*, p. 337. Extortion.

§ 28. *Divisio quarta*, p. 339. Cod. 3. 31. 3. To the 14 actions here enumerated as bonæ fidei, may be added *actio ex stipulatu de dote*, of the next section.

§ 29. *De rei uxoriæ actione*, &c. p. 339. Cod. 5. 13.

§ 30 *De potestate judicis*, &c. *Et de compensationibus*, p. 340. This is the foundation of all our law of defalcation or set off: first given by 2 Geo. 2. ch. 22, and 8 Geo. 2. ch. 4. In Pennsylvania by act of Assembly, a defendant is required to bring forward every set off he may have against the plaintiff, otherwise he is barred from any future action. This seems however by the hundred dollar law of March 1810 to be confined to suits originally brought before a justice of the peace. See post § 39. of this title. *Nostra constitutio.* Cod. 4. 31. 14.

§ 31. *De actionibus arbitrariis*, p. 341. We have no such action. All actions *bonæ fidei*, belong to our equitable jurisdictions, whether at law (as in money had and received) or in chancery.

§ 33. *De pluris petitione*, p. 342 *Lege falcidia* vide Lib. 2. Tit. 22. of the Instit. *Lex Zenonia et nostra.* These constitutions are not extant.

Swancott v. Westgarth, 4 East, 75. was an action for goods sold and delivered on credit, and the question was, whether the action was commenced before the credit had expired. Held not; inasmuch as though he writ was issued before, the bill was filed after the credit had expired; but if defendant had been actually arrested, semble he would have been entitled to damages.

In *Hussen v. Price et al.* 4 East, 147. Credit for three months and then payment by a bill at two months, was held a credit for five months; and assumpsit could not be maintained at the end of three months, on neglect of paying by a two months bill, but the remedy was a special action on the case for damages.

Dann v. Spurrier, 3 Bos. and Pull. 399. A lease granted for 7, 14 or 21 years; Lessee has his option at which of the periods the lease shall determine.

§ 40 *De eo qui bonis cessit*, p. 348. By Cod. 7. 71. 1 and 8. and by Dig. 42. 3. 4. it should appear, that though the person of a debtor is discharged by a *cessio bonorum*, his property subsequently acquired is not. But this I apprehend is to be understood with the limitation stated in this section of the institutes, which is also confirmed by the provisions of Dig. 42 3. 6—42. 1. 17 and 30—42. 1. 19. 1—42. 1. 16 and Nov. 135. provisions which are similar in principle, to the English law, that forbids the tools and instruments of a man's trade to be seized. The creditors might either allow the debtor five years to pay his debts in, or take his property and discharge his person. Cod. 7 7. 8.

It would be a judicious regulation in my opinion, if future exoneration were denied to tradesmen, who neglected to keep fair and regular books of account, or who could not explain clearly the causes of their failure, and deficiency.

As to the question about cutting a debtor in pieces, *de debitore in partes secando*, notwithstanding Bynkershoek's observations and Dr. Taylor's dissertation, doubt yet remains whether the literal be not the true sense. Probably it was a law in terrorem only. Aul. Gall. Lib. 20. Ch. 1—8. Gibbon's Rom. Hist. p. 93. n. The *semoto omni cruciatu*, of the Code 7. 7. 8 is an expression of late date, that supports the cruelty of the literal meaning in the law of the 12 tables.

Tit. VII. quod cum eo qui in aliena potestate est, negotium gestum esse dicetur, p. 348. This title relates for the most part to cases not very prevalent here, except so far as they may be analogous to the law, how far a master is answerable for the contracts of his servant, for which see the head of master and servant in Espinasse's Dig. of N. P. and Comyn's on contracts, where the cases are well collected.

§ 4. *De peculio et in rem verso*, p. 350.

Aliquando tamen. When an action *de peculio* is brought for the full value of a *peculium*, which is worth, for example, an hundred *aurei*, and the slave, to whom the *peculium* belongs, owes 50 *aurei* to the son of his master, or to some other slave under the power of the same master, the judge must then deduct those fifty *aurei;* so that the plaintiff can only receive the remaining fifty. But, when a suit is commenced for 100 *aurei* against a *peculium*, which is worth but 100 *aurei*, and the slave, to whom this *peculium*, or separate estate belongs, is indebted in 50 *aurei* to another slave, who is under the same master, but yet makes a part or parcel of the *peculium*, by being appendant to it, in this case the judge is not authorised to order the 50 *aurei*, due to this vicarial or subordinate slave, to be deducted, but must cause the payment of the 100 *aurei*, *i. e.* of the whole value of the *peculium*, to be made to the plaintiff; and the reason, assigned for this by *Theophilus*, is the following: *et, cum ita se res habeat, non potest vicarius, cujus æstimatione peculium augetur, et ipse illud minuere, eo nomine, quod sibi aliquid debeatur; ne eadem persona duas contrarias habere functiones videatur, ut simul et augeant et minuat peculium. h. t.* Harris.

§ 7. *De senatus-consulto Macedoniano*, p. 353.

Senatus-consultum Macedonianum.] This decree was called *Macedonian* form *Macedo*, the name of the person, who gave rise to it; but, whether this *Macedo* was a young patrician under the power of his father, or an old usurer, the learned commentators are in very great doubt; and they are even far from being unanimous, as to the time when this decree was first made. But it is certain, that the emperor *Claudius* published a law, by which, to use the words of *Tacitus*, he restrained the cruelty of creditors; *Sævitiam creditorum coercuit; ne in mortem parentum pecunias filiis-familiarum fœnori darent. Tac. lib.* 11. *annalium.* And this law is conjectured to have been the *Macedonian Senatus-consultum;* which, in order to reconcile the two historians *Tacitus* and *Suetonius*, is supposed by some to have grown obsolete in the reign of *Nero*, and afterwards to have been revived by *Vespasian*; for *Suetonius* writes as follows in the life of that emperor, *viz. Auctor senatui fuit Vespasianus decernendi, ne filiorum-fam. fœneratoribus exigendi crediti jus unquam esset, hoc est, ne post patris quidem mortem.* Those, who have time and inclination to read more upon this subject, are referred to the *Syntagma* of *Heinneccius*, *lib.* 4. *t.* 7. but particularly to *Peter Faber's Semestrium*, *lib.* 1. *cap.* 25. Harris.

Upon the subject of the Macedonian decree, and catching bargains, where heirs bargain on the credit of their expectancies, the leading

cases are *Chesterfield and Jansen*, 1 Atk. 301—355. and *Gwynne v. Heaton*, 1 Brown's Ch. Ca. 1. I refer to Fonblanque's references, 1 Fonb. 124, 125. to which add *Berney v. Tyson*, 2 Ventr. 259. *Fairfax v. Trigg*, Cas. Temp. Finch, 314.

Chancery also applies the principle of the Macedonian decree, to contracts for the prize money of Sailors, *Baldwin et al. v. Rochford*, 1 Wils. 229. *Taylor v. Rochford*, 2 Vez. 281. *How v. Weldon*, 2 Ves. 516. This last class of bargains however were made void by 20 Geo. 2. Ch. 24.

It is also extended in some degree to contracts between Parent and Child, *Cocking v. Pratt*, 1 Vez. 400. *Young v. Peachey*, 2 Atk. 254. and *Glisson v. Ogden*, there cited, p. 258. *Heron v. Heron*, 2 Atk. 158. *Blunden v. Barker*, 1 P. Wms. 639. *Hawes v. Wyatt*, 3 Br. Ch. Ca. 156.

Also to cases of Guardian and Ward, Trustee and Cestui que trust. *Purse v. Waring*, 1 P. Wms. 120. Coxe's note. *Hilton v. Hilton*, 1 Vez. 547. *Cray v. Mansfield*, 1 Vez. 379. *Hamilton v. Mohun*, 1 P. W. 118. *Osborne v. Chapman*, 2 Ch. Ca. 157. *Hatch v. Hatch*, 9 Ves. junr. 292. a strong case in point of time, for 24 years had elapsed. See also as to time elapsed, *Randall v Ennington*, 10 Vez. 423.

Analagous to these, are the cases of sales made by trustees and purchases for themselves: concerning which the doctrine seems nearly settled, that no person whether guardian, trustee, attorney, solicitor, or assignee interested to sell, can be permitted to buy: *Bovey v. Smith*, 1 Vern. 60. *Whelpdale v. Cookson*, 1 Vez. Senr 9. confirmed in *ex pte. James*, 8 Vez. Junr. 349. *Fox v. Macreath*, 4 Br. Ch. Ca. 326. 425. *Crowe v. Ballard*, 3 Br. Ch. Ca. 120. *Whichcote v. Lawrence*, 3 Vez. junr. 740. (the rule somewhat narrowed) *Lord Hardwicke v Vernon*, 4 Ves. 411. In *Campbell, v. Walker*, 5 Vez 680. Sir W. Grant, M. R. lays down the rule, that a trustee so purchasing, purchases under the liability of the sale being set aside by certui que trust. It would be better to stick to Lord Thurlow's rule in *Crowe v. Ballard*, a person employed to sell, should not be permitted to buy, even with knowledge of the party selling. Though, Sir W. Grant, denies there ever was such a rule. In *ex pte. Reynolds*, 5 Vez. 707. assignees of a bankruptcy were discharged, because one with knowledge of the other purchased at auction, part of the bankrupt's estate.

The estates were directed to be re sold, *ex pte. Lacey*, 6 Vez. 25. *Ex pte. Hughes*, Ib. 617. *Lister v. Lister*, Ib. 631.

So purchase of a bankrupt's estate by the solicitor to the commission, set aside *ex pte. James*, 8 Vez. 343. wherein the chancellor goes

far to confirm Thurlow's position. See also *Coles v. Trecothick*, 9 Vez. 247. *expte. Bennet*, 10 Vez. 393. *Morse v Royal*, 12 Vez. 364. and *Wright v Proud*, 13 Vez. 108. Sugd. L. Ven. and Pur. 331. to 367. In *Campbell v. Walker*, 5 Vez. 681. Sir W. Grant, M. R. who seems inclined somewhat to relax the rule, says "the only thing a trustee can "do to protect his purchase, is, if he sees it is absolutely necessary the "estate should be sold, and he is ready to give more than any one else, "that a bill should be filed, and he should apply to the court to become "a purchaser." This may be convenient occasionally; still Lord Thurlow's rule is the best upon the whole. It closes at once, all the doors against fraud.

So trustee whether sole or joint cannot be receiver, —— *v. Jolland*, 8 Vez. 72.

The general principle of the Macedonian decree, viz. the protecting from fraud, those who by reason of inexperience, or want of knowledge, are unable sufficiently to protect themselves, has also been adopted in other cases in England. *Cleveland v. Osmond*, 3 P. Wms. 129. *Griffin v. Deveuille*, cited 3 P. Wms 131. *Bridgeman v. Green*, 2 Vez. 627. *Nantes v. Corrock*, 9 Vez. 182.

So in cases of attorney and client, any undue advantage of superior knowledge, confidence reposed, or fear excited, will be suppressed. *Walmsley v. Booth*, 2 Atk. 25. 27. *Draper's company v. Davis*, 2 Atk. 294. *Saunderson v. Glass*, Ib. 295. *Newman v. Payne*, 2 Vez. jun. 199. *Middleton v. Wills*, 4 Br. Par. Ca. 245. *Gibson v. Jeyes*, 6 Vez. 266. *Beaumont v. Boltbee*, 5 Vez. 485. 7 Vez. 599. So counsel are forbidden to make conditional bargains. *Shapholone v. Hart*, Rep. Temp. Finch. 477. 1 Eq. Ca. ab. 86. All these cases relate to the continuance of the relationship between attorney and client: otherwise they do not apply; *Oldham v. Hand*, 2 Vez. 259. The practices of administrators in this state, render the application of these cases, too often necessary.

Tit. VIII. De noxalibus actionibus, p. 354.

Ex maleficiis servorum.] The action *noxalis*, which lies against masters for the crimes of their servants, was always unknown in *England*: for even villeins, before the tenures in villenage were abolished, might have been convened for their own crimes. *Cow. inst. l. 4. t. 8.* But there is something in the law of *England* similar to a noxal action, in regard to animals and things inanimate, by which the death of a man is occasioned: for if a vitious horse, or bull, or a cart drawn by horses or oxen, occasions the death of any person, the thing, or animal, which did the mischief, becomes, as it were, sacred, and is called a

Deodand; [*i. e.* a thing given to God;] because it was sold in ancient times by the king's almoner, who distributed the money to pious uses. But, in regard to *Deodands*, the law makes many distinctions; *e. g.* if a ship or boat is laden with merchandise, and a man is killed, or drowned by the motion, yet the merchandise are no *Deodand*, though the accident happened in fresh water: but, if any particular merchandise fall upon a man, and kills him, that merchandise shall be *Deodand*, but not the ship.——See *Hale's Hist. of the pl. of the Crown. Vol.* 1. *p.* 422. *Hawk. pl. of the Crown. lib.* 1. *cap.* 26. Harris.

I am answerable for the misconduct, unskillfulness or negligence of those whom I employ. *Jarvis v. Hayes*, 2 Str. 1004. Anon. 1 Lord Ray, 739. 2 Salk. 441. *Bush v. Stainman*, 1 Bos. and Pull. 404. *Stone v. Cartwright*, 6 Term. Rep 411 *Brucker v. Fromont*, 6 Term Rep. 659. *Hugget v. Montgomery*, 2 Bos. and Pull. New Rep. 446. *Bussy v. Donaldson*, 4 Dall. 206. *Snell v. Rich*, 1 Johns. Rep. 305. 1 Camp. N. P. 497. But not where the injury arises from wilful violence or gross negligence, not reasonably connected with the duty in which I employ him, and in my absence. *Savignac v. Roome*, 6 Term Rep. 125. *M'Manus v. Cricket*, 1 East, 106. *Morley v. Gaisford*, 2 Hen. Bl. 442. 2 Bays, S. Car. 345.

Tit. IX. Si quadrupes pauperiem fecisse dicatur, p. 357.

The point here made, of *equus calcitrosus*, a horse accustomed to kick—*bos cornu petere solitus*, an ox accustomed to run at people, is adopted in modern decisions. So case lies against the owner of a dog accustomed to bite: and of this the owner must have notice. See *Mason v Keeling*, 1 lord Raym. 606. *Buxenden v. Sharp*, 2 Salk. 662. *Smith v. Pelah*, 2 Str. 1264. *Brook v. Copeland*, 1 Esp. N. P. Rep 203. *Bolton v. Banks*, Cro. Car. 254. *Kinnion v. Davis*, Cro. Car. 487. *Jenkins v. Turner*, 1 lord Ray. 118.

§ 1. *De actione ædilitia, concurrente cum actione de pauperie*, p. 358.

De eadem re concurrentes.] The same doctrine is delivered by *Ulpian*, *ff.* 44. *t.* 7. *l.* 60. *ff.* 50. *t.* 17. *l.* 130. which doctrine we must understand to regard penal actions, concurring on account of the same thing, but yet arising from different facts and offences; as for instance, if a man steals a slave, and afterwards murders him, such a criminal may be doubly prosecuted, for theft and injurious damage; for as the actions of theft and injurious damage would arise in this case from different offences, the one will not bar the other: but, on the contrary, if two penal actions, concurring on account of the same thing, should arise from the same offence, the one would destroy the other; and therefore the plaintiff must make his election. *vid Cuj. observ. lib.* 8. *c.* 24. *Hotom. ill. last, quæst.* 29. Harris.

Tit. X. De iis per quos agere possumus, p. 358.

Aut suo nomine aut alieno.] In *England* the liberty of constituting an attorney to prosecute suits is given chiefly by the statute law. *vid.* 20. *H.* 3. *cap.* 10. 12 *Edw.* 2. *cap.* 1. 15 *Edw.* 2. *cap.* 1. 7 *Ric.* 2. *cap.* 14. 7 *Hen.* 4. *cap.* 13. 29 *Eliz. cap.* 5. For, by the common law, the plaintiff or defendant, demandant or tenant, could not appear by attorney without the king's writ, or letters patent, but ought to follow his suit in his own proper person. *Abusion est* [says the author of the Mirror] *a reteiner attorny sans breve de la chancerie. Co. Litt.* 128. *a.* Harris.

In cases requiring corporal punishment, a proctor was not allowed Dig. 48. 1. 13.

A proctor in England must file his power by 4 and 5 Ann. ch. 16.

Mandamus will not lie to reinstate a proctor. *Leigh's case*, 3 Mod. 332.

When a proctor ceases to be so, and in what cause, see Hall's practice of the court of admiralty, p. 20. A letter of attorney is only a power to transact business *ad negotia:* a warrant of attorney is *ad litem.* See an instructive case as to the acts of an attorney, and the distinction between our attorneys at law, and the proctors of the Roman law. *Denton v. Noyes*, 6 Johns. rep. N. Y. 302. et seq.

Tit. XI De satisdationibus, p. 360. Dig. 46. 7. 9. and 46. 7. 20. Dig. 2. 8. The securities or cautions judicially required, are, *judicio sisti:* to attend and appear during pendency of the suit. *De rato:* to confirm the acts of his attorney or proctor. *Judicium solvi:* to pay the sum adjudged against him.

These were taken either by sureties, *Cautio fide jussoria.* By deposit, *Cautio pignoratitia.* By oath, *juratoria:* and in some cases by bare promise only, *nudi promissoria.* See an useful book, Hall's admiralty practice, p. 13.

The plaintiff also is required, by the civil law generally, to find caution, to prosecute the suit; to pay costs if the judgment be against him, and to confirm the acts of his attorney; see Nov. 33. 1 and 2. Nov. 96. 2. Nov. 112. 2 and Edict 7 Justiniani.

Tit. XII. De perpetuis et temporalibus actionibus, p. 363.

Perpetuo solere. As to the English acts of limitation, see Co. Litt. 118. a. 2 Co. Inst. 94, 95. 32 Hen. 8 ch. 2. 21 Ja. 1 ch. 16. Generally in England this act must be pleaded: in New-York the limitation act may be given in evidence under the general issue and notice. In Pennsylvania, it is pleaded, except in ejectment.

Constitutionibus introductum. Cod. 7. 39. 4 and 5. Cod. 7. 4. Dig. 5. 5.

§ 1. *De actionibus quæ in hæredes transeunt vel non*, p. 364.

In England, and generally in America, *Actio personalis moritur cum persona.* This ought not to be the case in several kinds of action, as battery, mayhem, seduction &c. Under the Roman law, actions for torts descended to the heirs, but did not survive against the heirs. Dig. 50. 16. 38. Dig 2. 10 1. Dig 4. 7 4 and 5.

Tit. X. De exceptionibus, p. 365. This is a general view of what may be called the special pleading of the Roman law.

§ 6. *De cæteris exceptionibus*, p. 367. *Ex latioribus digestorum libris.* Dig. 4. 1.

§ 10. *De dilatoriis*, p. 368. *Subjacere censemus.* Neither the constitution of Zeno or of Justinian here referred to, is extant.

§ 11. *De dilatoriis ex persona*, p. 369. Pleas in abatement.

Tit. XIV. De replicationibus, p. 370. Rejoinders, surrejoinders, rebutters, surrebutters

§ 4. *Quæ exceptiones fide-jussoribus pro sunt vel non*, p. 371.

See ante Inst. 3. 21. *de fide-jussoribus*: and Inst. 4. 13. 3.

On the subject of mutuality between principal and surety, see *ex parte Gifford*, 6 Vez. 805. and *Wright v. Morley*, 11 Vez. 12. 22.

Tit. XV. De interdictis, p. 372. Interdicts are now out of use. There is no difference between interdicts and actions. See the 4th section of this title.

§ 3. *De interdictis adipiscendæ*, p. 374. The Salvian interdict was drawn up by Salvius Julianus at the order of the emperor Adrian. Dig. 43. 33.

§ 4. *De interdictis retinendæ*, p. 374. This section advances the common legal maxim of our law, *in æquali jure, melior est conditio possidentis.*

Uti possidetis. Dig. 43. 17. Ulp. Lib. 69. Cod. 8. 6.

Utrubi. Dig. 43. 31.

§ 6. *De interdicto recuperandæ*, p. 377. *Sed ex constitutionibus.* Cod. 8. 4. *Tenentur lege Julia.* Dig. 43. 16. Dig. 47. 1.

Tit. XVI. De pœna temere litigantium, p. 379.

§ 1. *De jurejurando et pœna pecuniaria*, p. 379.

This includes our Pennsylvania practice, of an affidavit of defence, an affidavit that a certiorari is not taken out for the purpose of delay, &c. The ancient action of calumny, was similar to our action on the case for malicious prosecution. As to *amerciament* in respect of suits, *misericordia*, and the *capiatur pro fine* of the English practice, see Serjeant Williams's note 1. to *Mortlake v. Charlton*, 2 Saund. 193.

Ex constitutione.] The oath of calumny was in use long before the reign of *Justinian*, as appears from many passages in the digests; *ff.* 10. *t.* 2. *l.* 44. *ff.* 12. *t.* 2. *ll.* 16. 34. *ff.* 39. *t*, 2. *l.* 13. § 3 *Qui damni infecti caveri sibi postulat, prius de calumnia jurare debet.* And in section 4 of the same book are these words —— *Si alieno nomine caveri mihi damni infecti postulem, jurare debeo,* NON CALUMNIÆ CAUSA ID EUM, CUJUS NOMINE CAUTUM POSTULO, FUISSE POSTULATURUM. *Ulpian.*

But the oath seems afterwards to have fallen into desuetude, and to have been only revived by the constitution referred to; part of which is conceived in the following terms. *Actor quidem jurat,* NON CALUMNIANDI ANIMO LITEM SE MOVISSE SED ÆSTIMANDO BONAM CAUSA HABERE.

Reus autem non aliter suis allegationibus utatur, nisi prius et ipse juraverit;—QUOD, PUTANS SE BONA INSTANTIA UTI, AD RELUCTANDUM PERVENERIT. *Cod.* 2. *t.* 59. *l.* 2.

The canon law permits even a proctor to swear *in animam domini sui*, vid. *decret. Greg.* ix. *lib.* 2. *t.* 7. And this was formerly the practice in all the ecclesiastical courts in *England*, vid. *ord. judiciorum. tit.* 99. *and* 110.—*canon* 132.—But the oath of calumny is now disused not only in *England*, but also in those countries, where the canon law is in full force, and where the civil law is the law of the land, *vid. La jurisprudence du Code conferee avec les ordonances Royaux de France. tom.* 1. *p.* 297.——*Groenw. de ll. abr. in 4tam. inst. t.* 16.—*Philiberti Bugnion ll. abr. tractatus lib.* 1. *cap.* 3. Harris.

Alia nostra constitutione.] *vid. Cod.* 3. *t.* 2. *l.* 14. et novellam. *Patroni autem causarum*, &c. Harris.

§ 2. *De infamia*, p. 380. *Ignominiosi fiunt*, Dig. 3. 2. Cod. 2. 12.

Non contraris actionibus. Nam in contrariis judiciis de dolo aut perfidia non agitur; sed tantum de calculo et supputatione ejus, quod contrario judicio agenti abest. Vinn.

Pennsylvania, to the infinite disgrace of her jurisprudence, makes no difference between a debtor on account of crime, and a debtor on account of contract: under the insolvent laws, a convicted criminal is permitted to defraud the officers of court of their fees; and though in jail for damages given for the most atrocious injuries to person or character, this is no bar to his deliverance. Under the practice of the insolvent laws of this state, they appear to be enacted for the protection of criminals, and swindlers, as the favourites of the legislature: and this, under the notion, that all imprisonment on account of pecuniary obligation, is contrary to the mild character required in the laws of a democracy.

§ 3. *De in jus vocando*, p. 381. Dig. 2. 4. Cod. 2. 2.

Tit. XVII. De Officio Judicis, p. 382.

§ 4. *Familiæ erciscundæ*, p. 384. This is our suit by writ of parti See acts of assembly of Pennsylvania digestedby Purdon tit. Parti and *Walker v. Dilworth et al.* 2 Dall. 257. and *M'Kee et al. v. Stra al.* 2 Binn. 1. by which it was settled that 8 and 9 W. 3 ch. 31. conc ing partitions, does not extend to this state.

§ 6. *Finium regundorum*, p. 385.

Si finium regundorum] The writs *de perambulatione faciendâ*, *rationabilibus divisis*, are of the same use in the law of *England*, *judicium finium regundorum* in the *Roman* law.

The writ *de perambulatione* lies, when two lordships are near ea the p, and some encroachment hath been made; for then, by asse both lords, the sheriff shall take with him the parties and their ne bours, and shall make perambulation, and fix the bounds, as they before. But, if one lord encroaches upon another, and will not a to a perambulation, the party aggrieved shall have the writ *rationa divisis* against the other. *vid. Terms de la ley, and Fitzherbert brev.* p 303. 309. Harris.

Tit. XVIII. De publicis Judiciis, p. 386.

§ 3. *Exempla. De læsa majestate*, p. 387.

Lex Julia magistratis.] *v. ff* 48. *t* 4. and *Calvin's lexicon juri*

In *England* the stated judgment for high treason, in all cases counterfeiting the coin, is, that the offender shall be drawn to the of execution, and there hanged by the neck and cut down alive; his entrails shall be taken out and burned, his head cut off, his quartered, and his head and quarters put up, where the king shall reet. The judgment in the case of a woman is, "that she shall drawn and burned."

In this judgment is implied, the forfeiture of all the offender nors, lands, tenements, and hereditaments: his wife loses her d his children become base and ignoble: he loses his posterity, blood is stained and corrupted. All his goods and chattles are wise forfeited. 3 *Co. Inst.* 200, 211. *Strahan's Domat. supp. of the crown*, 258 Harris.

§ 4. *De adulteriis*, p. 387.

Lex Julia vid. ff. 48. *t. 5. ad legem Juliam de adulteriis coerc*

Gladio punit.] In *England*, and most other countries at this d dulterers are punished by fine.

Cum masculis nefandam libidinem.] The crime here meant is ry or sodomy; under which words all unnatural carnal copulation

to be understood. The ancient *English* lawyers all agree, that it ought to be punished with death, *ultimo supplicio*; though they differ as to the manner of inflicting it. *Britton* says, that *Sodomites* and miscreants shall be burned:—*Fleta* writes, that they shall be buried alive; *pecorantes et sodomitæ in terra vivi confodiantur*—The author of the *mirror* also delivers himself much to the same purpose; and adds, that *Sodomie est crime de majestie vers le roy celester*. At this day by 25 *Hen.* 8. *cap.* 6. and 5 *Eliz.* 17. the commiters of this crime, whether male or female, are no otherwise punishable, than as common felons, who are denied the benefit of the clergy. 3 *Co. Inst. cap.* 10. *Hawk. pl. of the crown, lib.* 1. *cap.* 4. But it was doubted by some of the judges in the 4th year of *Geo.* 1. (though with little reason according to *Fortescue*) whether a man, indicted for buggery with a woman, could legally be convicted upon the above mentioned statute of 25 *H.* 8. See the *King v. Wiseman*, *Fortescue's Repts.* 91. Harris.

See the notes of 8 Gibb. R. Hist. 19.

Stuprum. In *Dean v. Peel*, 5 East, 45. it was decided, that a father could not have *per quod servitium amisit*, if his daughter, though a minor lived at the time of the seduction in another person's family but returned to her father who maintained her. This is something like a sacrifice of justice to form.

§ 5. *Lex Cornelia de sicariis*, p. 387. *vid. ff.* 48. *t.* 8. *ad legem Corneliam de sicariis et veneficis.*

Venefici capite damnatur.] In *England*, all persons suspected of conjuration, witchcraft, or inchantments, were anciently cited into the spiritual courts, where, if they were found guilty, sentence was pronounced; upon which the aid of the secular power was demanded by the ecclesiastical judge, and the supposed delinquents were burned, as heretics, by virtue of the writ *de hæretico comburendo*; which was taken away by the 29th of *Charles* the 2d, *cap.* 9. *Vid.* 3 *Co inst.* 44, 45.

Thus the ecclesiastical judges had the entire jurisdiction in respect to sorceries and enchantments, which were all ranked under the general term heresies, till the statute of the 33 *H.* 8. which was the first statute, by which any of these offences were made felony; but this act was repealed by the 1st of *Edward* VI *cap.* 12.

Conjuration and the invocation of wicked spirits were afterwards made felony by 5 *Eliz. cap.* 16. And again, by a statute in the first year of *James* the first, by which the act of *Eliz.* is repealed.

The 1st of *Jac.* 1. *cap.* 12. is to the following purport.

"That the act of 5 *Eliz.* against conjurations, inchantments, and "witchcrafts, be utterly repealed.——That if any person or persons

"shall use, practice, or exercise any invocation or conjuration of any "evil and wicked spirit; or shall consult, covenant with, entertain, "employ, feed, or reward any evil and wicked spirit to and for any in- "tent or purpose;——or take up any dead man, woman or child, out "of his, her, or their grave, or any other place, where the dead body "resteth, or the skin, bone, or any other part of any dead person, to "be employed in any manner of witchcraft, inchantment, charm or sor- "cery, whereby any person shall be killed, destroyed, wasted, consum- "ed, pined or lamed in his or her body, or any part thereof; that then "every such offender, or offenders, their aiders, abettors, and counsel- "lors, being guilty of any of the said offences, duly and lawfully con- "victed, shall suffer pains of death, as a felon or felons, and shall lose "the benefit of clergy and sanctuary.

"And further, to the intent that all manner of practice, use or exer- "cise of witchcraft, inchantment, charm, or sorcery, should be from "henceforth utterly abolished, be it enacted, that, if any person or per- "sons, shall from and after the feast of St. Michael next coming, take "upon him or them by witchcraft, inchantment, charm, or sorcery, to "tell or declare in what place any treasure might be found, or where "goods, or things lost or stolen, should be found, or to the intent to "provoke any person to unlawful love; or whereby any cattle or goods "of any person, shall be destroyed, wasted or impaired; or to hurt or "destroy any person in his or her body, although the same be not effect- "ed; that then all persons, so offending, and being convicted, shall "suffer a year's imprisonment, and stand in the pillory once every "quarter for six hours, and there openly confess his, or her error, and "offence." The second offence is felony. 1 *Jac.* 1. *cap.* 12.

Lord *Coke* hath written a learned comment upon this statute, in which he declares, that it would be a very great defect in government to suffer so great an abomination, as conjuration, witchcraft, and sorcery, to pass with impunity. 3 *Inst.* 44.

But the tendency of the statute of the 1st of *James* the 1st, may best appear from the cheats, perjuries, and various other mischiefs, which it produced, to the ruin of many innocent persons; all which are but too well known to require any particular mention. vid. *Mather's* Hist. of New England; and Salmon's Universal Traveller. vol. II p. 695. This act nevertheless continued to be a scandal and reproach to the good sense of the nation, till the 9th year of George the 2d, when it was enacted by parliament.—— "That the statute, made "in the first year of king James the first, intitled, *An act against con-* "*juration, witchcraft, and dealing with evil and wicked spirits,* [illegible]

"repealed and utterly void, except so much as repeals the statute of "the 5th of *Elizabeth*, intitled an act against conjuration, &c. &c.—that "an act passed in *Scotland*, in the ninth parliament of Queen *Mary*, in- "titled *Anentis witchcrafts*, shall be repealed——and that from the "24th of *June* no prosecution, suit or proceeding, shall be carried on "against any person for witchcraft, sorcery, inchantment, or conjura- "tion, or for charging another with any such offence, in any court "whatsoever in *Great Britain*——but that any person, pretending to "exercise witchcraft, tell fortunes, or discover stolen goods, shall suf- "fer imprisonment for one whole year, stand in the pillory once every "quarter for an hour; and if the court shall think proper, be obliged "to give sureties to behave well for the future." 9 Geo. 2. Harris.

Thus far Harris: to whose note add Cod. 9. 18. Those who desire further information on the practical comments that have taken place, on that notable passage in the old Testament, "Thou shalt not suffer a witch to live" may consult sir James Melville's memoirs as to the examination of the witches before James 6th of Scotland: the trial of Amy Duny and Rose Cullender, widows, both of Leystoff, in Suffolk, before sir Matthew Hale, on the 10th of March 16th Ch. 2nd. at Bury St. Edmonds, where says the account, "in conclusion, the judge and all "the court were fully satisfied with the verdict, and thereupon gave "Judgment against the witches that they should be hanged. They "were much urged to confess, but would not: on the 17th of March "following they were executed;" much to the credit of sir Matthew Hale! See also the statements which Ch. Justice Marshall in his life of Washington Vol. 1. Appendix page 9, gives of the proceedings of the bigots of New England in 1692, from Hutchinson; and Dr. Feriar's essay on popular illusions in the Manchester transactions.

§ 6. *De parracidiis*, p. 388. Vide Dig 48. 8 and 9. Cod 9. 16 and 17. De lege Pompeia de parracidiis. On the laws de sicariis et parricidiis, see further Cod. Theodos. 9. 14 and 15. with Godefroy's commentary, V. 3 p. 84—118.

§ 7. *De falsis*, p. 389. Dig. 48. 10. 5 Eliz. ch. 14. 8 Geo. 1. ch. 22. 12 Geo. 1 ch. 22. 2 Geo. 2 ch. 25, &c. Our Pennsylvania act respecting forgery.

§ 8. *De vi*, p. 389. Dig. 48. 6. 7. Cod. 9. 13.

§ 9. *De peculatus*, p. 390. A *pecore*, in which wealth chiefly consisted in early times. Dig. 48. 13.

§ 10. *De plagiariis*, p. 390. Dig. 48. 15. Cod. 9. 20. I have already spoken of Kidnapping, at sect. 9. of Tit. 1 of this book of the Institutes.

§ 11. *De ambitu*, p. 391.

Lex Julia de ambitu.] *vid. ff* 48. *t.* 14.

The crime, which the Romans called *ambitus*, is committed by procuring any public office with money, or other gifts; and it seems to be the same offence in regard to temporal offices, as simony is in regard to spiritual preferment. *Decret Greg* ix. *lib.* 5 *t.* 3.

But *ambitus*, or the buying and selling of offices, ceased to be criminal, and became common among the *Romans*, soon after the demolition of the republic; and this practice continued, till *Justinian*, becoming sensible of its evil tendency, enforced the ancient laws in order to restrain it. *Nov.* 8. *cap.* 1. 7.

In *France* judicial offices are publicly set to sale, and generally sold to the highest bidder; and perhaps, as *Vinny* observes, there may be less reason to prohibit this species of commerce in a monarchy, than in a democracy.

But in England the statute of the 5th and 6th of *Edw.* VI. restrains "all persons under pain of forfeiture and disability for the future, from "buying certain offices, which concern the king's revenue, and the ex- "ecution of justice." And under these offices not only that of the chancellor of a diocess is comprehended, but also that of a commissary and register; for it was resolved in the case of doctor *Trevor*, the chancellor of a diocess in *Wales*, that both the offices of chancellor, and register, are within the statute, because they concern the administration of justice. 3 *Co. Inst.* 148. 12 *Co. rep.* 78. 79. 3 *Lev.* 289. *Woodward v. Fox.* Harris.

Lex Julia repetundarum.] This law forbids all persons in public offices to take money or presents, either for administering justice, or committing injustice. *Lege Julia repetundarum* [*pecuniarum*] *tenetur, qui, cum aliquam potestem haberet, pecuniam ob judicandum decernendumve acceperit.* ff. 48. t. 11.

Fortescue, on the laws of *England*, declares "bribery to be a great "misprision, which is committed, when any man in a judicial place "takes any fee or pension, robe or livery, gift, reward or brocage of "any person, who hath to do before him any way, for doing his office, "or by color of his office, but of the king only, unless it be of meat "and drink, and that of small value. *cap.* 51." 3 *Co. Inst.* 145. Harris.

De anona.] The crime *fraudatæ annonæ* is that of abusing the markets, by raising the price of provisions, forestalling, monopolizing, &c.

This offence is punishable in England by imprisonment and forfeiture of the goods or merchandise forestalled. See 25 *Ed.* 3 [illegible] 2 *Ric.* 2. *cap.* 2. 27 *Ed.* 3. *cap.* 11. 5, 6 *Edw.* 6. *cap.* 14. 3 *Co.* [illegible] *p.* 195.

De residuis.] *Crimen residui* is committed by retaining the public money, or converting it to other uses than those, to which it was appropriated. *Lege Julia de residuis tenetur, qui publicam pecuniam delegatam in usum aliquem retinuit, neque in eum consumpsit.* ff. 48. t. 13. Harris.

END OF THE NOTES.

FRAGMENTS

OF THE

TWELVE TABLES,

From Fathers Catrou, and Rouillè.

Hook's Rom. Hist. Vol. 2. p. 314. 8vo.

TABLE I.

OF LAW SUITS.

I. Law. Go immediately with the person who cites you before the judge.

II. Law. If the person you cite refuses to go with you before the judge, take some that are present to be witnesses of it, and you shall have a right to compel him to appear.

III. Law. If the person cited endeavours to escape from you, or puts himself into a posture of resistance, you may seize his body.

IV. Law. If the person prosecuted be old, or infirm, let him be carried in a *Jumentum*, or open carriage. But if he refuse that, the prosecutor shall not be obliged to provide him an *Arcera*, or a covered carriage.

V. Law. But if the person cited find a surety, let him go.

VI. Law. Only a rich man shall be security for a rich man. But any security shall be sufficient for a poor man.

VII. Law. The judge shall give judgment according to the agreement made between the two parties by the way.

VIII. Law. If the person cited has made no agreement with his adversary, let the *Prætor* hear the cause from sun-rising till noon; and let both parties be present when it is heard, whether it be in the *Forum*, or *Comitium*.

IX. Law. Let the same *Prætor* give judgment in the afternoon, though but one of the parties be present.

X. Law. Let no judgments be given after the going down of the sun.

XI Law. When the parties have pitched upon a judge or arbitrator by consent, let them give securities that they will appear. Let him who does not appear in court, pay the penalty agreed upon, unless he was hindered by some great fit of sickness, or by the performance of some vow, or by business of state, or by some indispensable engagement with a foreigner. If any one of these impediments happen to the judge or arbitrator, or either of the parties, let the hearing be put off to another day.

XII. Law. Whoever shall not be able to bring any witnesses to prove his pretensions before the judge, may go and make a clamour for three days together, before his adversary's house.

TABLE II.

OF ROBBERIES.

I. Law. He that is attacked by a robber in the night, let him not be punished if he kills him.

II. Law. If the robbery be committed by day, and if the robber be taken in the fact, let him be beaten with rods, and become the slave of him whom he robbed. If the robber be a slave already, let him be beaten with rods, and thrown down headlong from the top of the capitol. If he be a child, under the age of *puberty*, let him be corrected, according to the *Prætor's* discretion, and let reparation be made to the injured party.

III. Law. When robbers attack any person with arms, if the person attacked has cried out for help, he shall not be punished if he kill the robbers.

IV. Law. When upon a legal search any stolen goods are found in a house, the robbery shall be punished upon the spot, as if openly and publickly committed.

V. Law. For robberies committed privately, the robber shall be condemned to pay double the value of the things stolen.

VI. Law. Whosoever shall cut down trees, which do not belong to him, he shall pay 25 *Asses* of brass, for every tree so felled.

VII. Law. If any one comes privately, by night, and treads down another man's field of corn, or reaps his harvest, let him be hanged up, and put to death, as a victim devoted to *Ceres*. But if he be a child, under the age of *puberty*, let the *Prætor* order him to be corrected as he shall think fit, or let double satisfaction be made for the damage he has done.

VIII. Law. If a robber and the person robbed agree together upon terms of restitution, no farther action shall lie against the robber.

IX. Law. Prescription shall never be pleaded as a right to stolen goods, nor shall a foreigner have a right to the goods of any *Roman* citizen, by the longest possession.

X Law. If any one betrays his trust, with respect to what is deposited in his hands, let him pay double the value of what was so deposited, to him who entrusted him with it.

XI. Law. If any one finds any of his goods in another man's possession, who became possessed of them by a breach of trust, let the *Prætor* nominate three arbitrators to judge of it. And let the wrongful possessor pay double the value of what he has gained by detaining them.

XII. Law. If a slave has committed a robbery, or done any damage, with the privity, and at the instigation of his master, let the master deliver up the slave to the person injured, by way of compensation.

TABLE III.

OF LOANS, AND THE RIGHT OF CREDITORS OVER THEIR DEBTORS.

I. Law. Let him who takes more than one *per Cent.* interest for money, be condemned to pay four times the sum lent.

II. Law. When any person acknowledges a debt, or is condemned to pay it, the creditor shall give his debtor thirty days for the payment of it: After which he shall cause him to be seized, and brought before a Judge.

III. Law. If the debtor refuses to pay his debt, and can find no security, his creditor may carry him home, and either tie him by the neck, or put irons upon his feet, provided the chain does not weigh above fifteen pounds; but it may be lighter, if he pleases.

IV Law. If the captive debtor will live at his own expence, let him; if not, let him who keeps him in chains allow him a pound of meal a day, or more, if he pleases.

V. Law. The creditor may keep his debtor prisoner for sixty days. If in this time the debtor does not find means to pay him, he that detains him shall bring him out before the people three market-days, and proclaim the sum, of which he has been defrauded.

VI. Law. If the debtor be insolvent to several creditors, let his body be cut in pieces on the third market-day. It may be cut into more or fewer pieces with impunity: Or, if his creditors consent to it, let him be sold to foreigners beyond the *Tiber*.

TABLE IV.

OF THE RIGHT OF FATHERS OF FAMILIES.

I. Law. Let a father have the power of life and death over his legitimate children, and let him sell them when he pleases.

II. Law. But if a father has sold his son three times, let the son then be out of his father's power.

III. Law. If a father has a child born, which is monstrously deformed, let him kill him immediately.

IV. Law. Let not a son, whose father has so far neglected his education as not to teach him a trade, be obliged to maintain his father in want; otherwise let all sons be obliged to relieve their fathers

V. Law. Let not a bastard be obliged to work to maintain his father.

TABLE V.

OF INHERITANCES AND GUARDIANSHIPS.

I. Law. After the Death of a father of a family, let the disposition be made of his estate, and his appointment concerning the guardianship of his children be observed

II. Law. If he dies intestate, and has no children to succeed him, let his nearest relation be his heir; if he has no near relation, let a man of his own name be his heir.

III. Law. When a freed-man dies intestate, and, without heirs, if his patron be alive, or has left children, let the effects of the freed-man go to the family of his patron.

IV. Law. After the death of a debtor, his debts shall be paid by his heirs, in proportion to the share they have in his inheritance. After this they may divide the rest of his effects, if they please, and the *Prætor* shall appoint three arbitrators to make the division.

V. Law. If a father of a family dies intestate, and leaves an heir under age, let the child's nearest relation be his guardian.

VI. Law. If any one becomes mad, or prodigal, and has no-body to take care of him, let a relation, or if he has none, a man of his own name, have the care of his person and estate.

TABLE VI.

OF PROPERTY AND POSSESSION.

I. Law. When a man conveys his estate to another, let the terms of the conveyance create the right.

II. Law. If a slave, who was made free on condition of paying a c tain sum, be afterwards sold, let him be set at liberty, if he pay the p son who has bought him, the sum agreed upon.

III. Law. Let not any piece of merchandize, though sold and d livered, belong to the buyer, till he has paid for it.

IV. Law. Let two years possession amount to a prescription f lands, and one for moveables.

V. Law In litigated cases the presumption shall always be on t side of the possessor: And in disputes about liberty or slavery, t presumption shall always be on the side of liberty.

TABLE VII.

OF TRESPASSES AND DAMAGES.

I. Law. If a beast does any damage in a field, let the master of t beast make satisfaction, or give up his beast.

II. Law. If you find a rafter or a pole which belongs to you, in a ther man's house or vineyard, and they are made use of, do not p down the house, or ruin the vineyard; but make the possessor pay d ble the value of the thing stolen; and when the house is destroyed, the pole taken out of the vineyard, then seize what's your own.

III. Law. Whoever shall maliciously set fire to another man's ho or an heap of corn near his house, shall be imprisoned, scourged, burnt to death. If he did it by accident, let him repair the dam And if he be a poor man, let him be slightly corrected.

IV. Law. Whoever shall deprive another of the use of a limb, sh be punished according to the law of retaliation, if the person injur does not agree to accept some other satisfaction.

V. Law. If he has only dislocated a bone, let him pay three h dred pounds of brass if the sufferer be a freed-man. hund and fifty if he be a slave.

VI. Law. For common blows with the fist, a the punishment shall be twenty-five *Asses* of bra

VII. Law. Whoever slanders another by wo ses, and injures his reputation, shall be be

VIII. Law. Let him who has once bear witness again, though a pu made incapable of bearing w

IX. Law. Let every fa the *Capitol.*

X. Law. Whoever shall wilfully kill a freed-man or shall make use of magical words to hurt him, or shall have prepared poison for him, or given it to him, shall be punished as an homicide.

XI. Law. Let all *Parricides* be thrown into the river, sewed up in a leather bag, and with their heads veiled.

XII. Law. The guardian who manages the affairs of his ward ill, shall be reprimanded; and if he be found to have cheated him, he shall restore double.

XIII. Law. A patron who shall have defrauded his client, shall be execrable.

TABLE VIII.

OF ESTATES IN THE COUNTRY.

I. Law. Let the space of two foot and an half of ground be always left between one house and another.

II. Law. Societies may make what by-laws they please among themselves, provided they do not interfere with the public laws.

III. Law. When two neighbours have any disputes about their bounds, the *Prætor* shall assign them three arbitrators.

IV. Law. When a tree planted in a field does injury to an adjoining field by its shade, let its branches be cut off fifteen feet high.

V. Law. If the fruit of a tree falls into a neighbouring field, the owner of the tree may go and pick it up.

VI. Law. If a man would make a drain, to carry off the rain-water from his ground to his neighbour's, let the *Prætor* appoint three arbitrators, to judge of the damage the water may do, and prevent it.

VII. Law. Roads shall be eight feet wide, where they run strait, and where they turn, sixteen.

VIII. Law. If a road between two fields be bad, the traveller may drive through which field he pleases.

TABLE IX.

OF THE COMMON RIGHTS OF THE PEOPLE.

I. Law. Let not privilege be granted to any person.

II. Law. Let both debtors who are got out of slavery, and strangers who have rebelled, and returned to their duty, be restored to their ancient rights, as if they never offended.

III. Law. It shall be a capital crime for a judge or arbitrator to take money for passing judgment.

IV. Law. Let all causes, relating to the life, liberty, or rights of a *Roman* citizen, be tried only in *Comitia by Centuries*.

V. Law. Let the people appoint *Quæstors*, to take cognizance of all capital cases.

VI. Law. Whoever shall hold seditious assemblies in the city by night, shall be put to death.

VII. Law. Let him who shall have solicited a foreigner to declare himself against *Rome*, or shall have delivered up a *Roman* citizen to a foreigner, lose his life.

VIII. Law. Let only the last laws of the people be in force, [i. e. *let the last supercede all former ones, in the same case made and provided.*]

TABLE X.

OF FUNERALS, AND ALL CEREMONIES RELATING TO THE DEAD.

I. Law. Let no dead body be interred, or burnt within the city.

II. Law. Let all costliness and excessive wailings be banished from funerals.

III. Law. Let not the wood, with which funeral piles are built, be cut with a saw.

IV. Law. Let the dead body be covered with no more than three habits, bordered with purple; and let no more than ten players upon the flute be employed in celebrating the obsequies.

V. Law. Let not the women tear their faces, or disfigure themselves, or make hideous outcries.

VI. Law. Let not any part of a dead body be carried away, in order to perform other obsequies for the deceased, unless he died for war, or out of his own country.

VII. Law. Let no slaves be embalmed after their death; let there be no drinking round a dead body; nor let any perfumed liquors be poured upon it.

VIII. Law. Let no crowns, festoons, perfuming-pots, or any kind of perfume, be carried to funerals.

IX. Law. If the deceased has merited a crown in the public games, by any exploit of his own, or the expertness of his slaves, or the swiftness of his horses, let his panegyrick be made at his funeral, and let his relations have leave to put a crown upon his head, as well during

the seven days he remains in the house, as when he is carried to be buried.

X Law. Let no man have more than one funeral made for him, or than one bed put under him.

XI. Law. Let no gold be used in any obsequies, unless the jaw of the deceased has been tied up with a gold thread. In that case the corps may be interred or burnt with the gold thread.

XII. Law. For the future, let no sepulchre be built, or funeral pile raised, within sixty feet of any house, without the consent of the owner of the house.

XIII. Law. Prescription shall never be pleaded against a man's right to his burial-place, or the entrance to it.

TABLE XI.

OF THE WORSHIP OF THE GODS, AND OF RELIGION.

I. Law. Let all persons come with purity and piety to the assemblies of religion, and banish all extravagance from thence. If any one does otherwise, may the Gods themselves revenge it.

II. Law. Let no person have particular Gods of his own; or worship any new and foreign ones in private, unless they are authorised by publick authority.

III. Law. Let every one enjoy the temples consecrated by his forefathers, the sacred groves in his fields, and the oratories of his *Lares*. And let every one observe the rites used in his own family, and by his ancestors, in the worship of his domestic Gods.

IV Law. Honour the Gods of Heaven, not only those who have always been esteemed such, but those likewise whose merit has raised them thither, as *Hercules*, *Bacchus*, *Æsculapius*, *Castor*, *Pollux*, and *Romulus*.

V. Law. Let those commendable qualities, by which heroes obtained Heaven, be ranked among the Gods, as Understanding, Virtue, Piety, Fidelity; and let temples be erected to them. But let no worship ever be paid to any vice.

VI. Law. Let the most authorised ceremonies be observed.

VII. Law. Let law-suits be suspended on festivals, and let the slaves have leave to celebrate them after they have done their work. That it may be known on what days they fall, let them be set down in the calendars.

VIII. Law. Let the Priests offer up in sacrifice to the Gods, on certain days, the fruits of the earth, and berries: And on other days

abundance of milk, and young victims. For fear this ceremony should be omitted, the Priests shall end their year with it. Let them likewise take care to chuse for every God the victim he likes. Let there be priests appointed for some Gods, *Flamines* for others, and *Pontifex* to preside over them all.

IX. Law. Let no woman be present at the sacrifices which are offered up in the night, except at those which are made for the people, with the usual ceremonies. Nor let any one be initiated in any mysteries brought from *Greece*, but those of *Ceres*.

X Law. If any one steals what belongs, or is devoted to the Gods, let him be punished as a Parricide.

XI. Law. Leave perjury to be punished with death by the Gods, and let it be punished with perpetual disgrace by men.

XII. Law. Let the *Pontifices* punish incest with death.

XIII. Law. Let every one strictly perform his vows: But let no wicked person dare to make any offerings to the Gods.

XIV. Law. Let no man dedicate his field to the service of the altar; and let him be discreet in his offerings of gold, silver, or ivory. Let no man dedicate a litigated estate to the Gods: if he does, he shall pay double the value of it to him whose right it shall appear to be.

XV. Law. Let every man constantly observe his family-festivals.

XVI. Law. Let him who has been guilty of any of those faults, which make men execrable, and are not to be atoned for by expiations, be deemed impious. But let the priests expiate such as are to be expiated.

TABLE XII.

OF MARRIAGES, AND THE RIGHT OF HUSBANDS.

I. Law. When a woman shall have cohabited with a man for a whole year, without having been three nights absent from him, let her be deemed his wife.

II. Law. If a man catches his wife in adultery, or finds her drunk, he may, with the consent of her relations, punish her even with death.

III. Law. When a man will put away his wife, the form of doing it shall be by taking from her the keys of the house, and giving her what she brought. This shall be the manner of a divorce.

IV. Law. A child born of a widow, in the tenth month after the decease of her husband, shall be deemed legitimate.

V. Law. It shall not be lawful for the Patricians to intermarry with the Plebeians.

FROM BEAVER'S TRANSLATION OF FERRIERE'S HISTORY—*Page* 166.

OF THE QUOTATIONS AND ABBREVIATIONS.

As it is necessary in the first place, to know how to make use of the *quotations* which we meet with in the books of the *civil law*; and to find out the several *laws* quoted by authors; I thought it my business to lay down some rules for that purpose.

The body of the *civil law*, as we said before, is composed of four parts, the *digest*, *code*, *institutes* and *novels*.

The *laws* of the *digest*, are generally quoted by the first word, and number of the *law*; for instance, *Lege si quis tertia Digestis de jure codicillorum*; sometimes the number only, or the first word of the *law* from whence the quotation is taken, is set down.

When a *law* is divided into several *paragraphs*, after the number of the *law*, that of the *paragraph*, or the first word of it, is set down; for example, *Lege* 32. § 11. *Digestis de donationibus inter virum et uxorem.*

Sometimes a *law* of a title in the *digest*, is quoted by the first word only, with the *title*, without mentioning whether it be out of the *digest* or *code*; and in that case, it is an indication that the *law* quoted is in the collection before spoken of; that is, in the *digest* or *code*, according as they were before mentioned.

The *laws* of the *code*, are quoted after the same manner as those of the *digest*.

The *paragraphs* of the *institutes*, are quoted after the same manner as the *laws* of the *digest* or *code*; thus a *paragraph* of the *institutes* is quoted, by shewing the number, and mentioning the first word of the *paragraph*, or by either; but the *title* under which the *paragraph* is, must always be mentioned, as thus, *paragrapho testes* 15. *Institutionibus*, or else *apud Justinianum de testamentis ordinandis.*

The *novels* are quoted by their number, with that of the *chapter* and the *paragraph*: For example, *Novella Justiniani*, 185. *Capite* 2. *Paragrapho* 4. or else a *Novel* is quoted by the *Collation*, and by the *Title*, *chapter*, and *paragraph*, after this manner, *in Authentico*, *Collatione*, 1. *Titulo* 1. *Cap.* 281.

As to the *Authenticks*, they are quoted by the first words of them, after which is set down the *title* of the *code* under which they are placed: for example, *Authentica cum testator*, *Codice ad legem falcidiam.*

This being laid down, let us now see how we shall go about to find out a quotation in the body of the *law*.

If the passage quoted is taken from the *digest* or the *code*, it will be best for beginners to turn to the alphabetical table of the *titles*, at the beginning of the body of the *law*; where having found the *title* mentioned in the quotation, they must then look in it for the *law*; by the number of first word.

If the quotation is taken from the *Institutes*, they must likewise have recourse to the table of *titles*; and after having found the book in which it is, look after it there, and then the *paragraph* which is quoted.

If we would find out a *Novel*, there is nothing more to be done, than to look after it by the number it is under.

If it be an *Authentick*, we must look in the table of the *Code*, for the *title* under which it is placed: It is so much the more easily found, because all the *Authenticks* are inserted in the *Code* in a different letter.

To conclude, as those who have a mind to look after any *law*, waste a great deal of time in turning over the table or index, they may save themselves that trouble, by rendering the titles of the body of the law familiar, and getting them by heart, by which means, they will acquire a general notion of the places where every particular matter is treated of, and without the least difficulty, be able to find out any *law* they have occasion to consult.

To compleat these instructions for young students how to find out the quotations in our books, it remains only that I explain the abbreviations.

ABBREVIATIONS.

AP. JUSTIN. *Apud Justinianum*, in *Justinian's institutes.*

ARG. or ARG. *Argumento*, by an argument drawn from such a law.

AUTH. *Authentica*, or the *Authentick*; that is to say, the *Summary* of some of the emperors *Novel constitutions* inserted in the *Code* under such a *title.*

CAP. *Capite* or *Capitulo*, in the chapter of such a *Novel.*

C. or COD. *Codice*, in *Justinian's code.*

C. THEOD. *Codice Theodosiano*, in the *Theodosian code.*

COL. *Columna*, in the first or second column of the book quoted.

COLL. *Collatione*, in the *collation* of such or such a *Novel.*

C. or CONT. *Contra*, this is generally used to denote a contrary argument.

D. *Dicto* or *Dicta*, that is, the aforesaid, or *law* or *chapter* before quoted.

D. *Digestis*, or in the *Digest.*

E. or EOD. Under the same title.

F. *Finalis*, the last or latter part.

ff. in the *Pandects* or *Digest.* The *Grecians* having made use of the Letter π, to signify *Pandects*, the *Romans* changed them into two *ff* joined together. *Digestorum liber ideo duplici ff. signatur, quod Graeci pandectas per π cum accentu circumflexo notabant, sub quibus, &c. Digestorum libri comprehensi sunt, unde facili litera π in ff. latine immutavit*, says *Calvin* in his *Lexicon Juris.*

GL. *Glossa*, the *Gloss.*

H. *Hic*, here, in the same *title*, *law* or *paragraph.*

H. TIT. *Hoc titulo*, in this Title.

I. or INF. *Infra*, beneath or below.

J. GLO. *Juncta Glossa*, the gloss joined to the text quoted.

IN AUTH. COLL. 1. *In authentico, collatione* 1. in *Justinian's Novel* part or Section 1, &c.

IN F. *In fine*, at the end of the *title*, *law* or *paragraph* quoted.

IN PR. *In principio*, in the beginning, and before the first paragraph of a *law.*

IN F. PR. *In fine principii*, toward the end of a beginning of a *law.*

IN SUM. *In summa*, in the *summary*.
L. *Lege* in such a *law*.
LI. or LIB. *Libro*, in the first or second book, &c.
NOV. *Novella*, in such a *Novel*.
PAR. *Paragrapho*, in such a *paragraph* or *article* of the *law*, or of a *Title* in the *Institutes*.
PR. or PRIN. *Principium*, the beginning of a *Title* or a *law*.
II. *Pandectis*, in the *pandects*.
Penult. The last but one.
Q QU. or QUÆS. *Quæstione*, in such a Question.
RU. or RUB. In such a *Rubrick* or *Title*. The *Titles* were called *Rubricks*, from their being formerly written in red letters.
SC. or SCIL. *Scilicet*, that is to say.
SOL. *Solutio*, the answer to an objection.
SUM *Summa*, the *summary* of a *law*.
§ *Paragrapho*, in such a *paragraph*.
T. or TIT. *Titulus*, *Titulo*, Title.
T. or *V. Versiculo*, in such a verse, which is a part of a *paragraph*.
ULT. *Ultimo*, *Ultima*, the last *Title*, *Paragraph* or *Law*.

APPENDIX III.

AUTHORS ON THE CIVIL LAW.

1st. Such as treat on the law previous to Justinian.
2dly. Such as treat historically on the Roman law generally.
3dly. The principal editions of the Corpus Juris Civilis.
4thly. Commentators on the Corpus Juris Civilis.
5thly. Compilations on the civil law.

FIRST. Historical treatises on the Leges Regiæ, Jus Papirianum, Duodecim Tabulæ, and the laws and collections intervening between them and Justinian.

Franciscus Balduinus. Libri duo in leges Romuli et duodecim tabularum. The third edition is the best. Basil. 1559. 8vo

Pardulphus Prateius. Jurisprudentia vetus: sive Draconis et Solonis, nec non Romuli Romanorum regis, ac 12 tabularum leges collectæ interpretatæque. Leyden. 1557.

J. Gothofred. Quatuor fontes juris civilis: sive leges 12 tabularum, cum earundem historia, &c. Legis Juliæ et Papiæ fragmenta: edictum perpetuum: librorum Sabinianorum ordo et series. 4to. Genev. 1653.

Rosinus also mentions several of the leges regiæ as inserted by Paulus Manutius. Rosinus himself gives a very brief and abridged

account of the history of the Roman law from Pomponius, which is worth perusal. Rosini Antiq Rom. quto. Amstelod. 1685. p 534. On the subject of the laws of the twelve tables in particular, he refers to the collections and comments of Julius Pacius, Antonius Augustinus, Joannes Oldendorpius, Joannes Crispinus, Antonius Contius, Fr. Hottomannus, Dionysius Gothofredus, Stephanus Pighius, F. Balduinus, Hadrianus Turnebus, Ludovicus Charondas, Justus Lipsius, and Theodorus Marcilius: of whom but few are noted by Camus in his Lettres sur la Profession D'Avocat. Paris, 1776.

The edition of J. Gothofred, in the book above cited, Quatuor fontes, &c. is in the most esteem.

Autores et fragmenta veterum jurisconsultorum, de origine et progressu juris romani, cum notis *Arnoldi Vinnii* et variorum. Ex edit. Sim. Van Leewen, Leyden, 1671. Jena, 1697 8vo.

Jurisprudentia vetus ante Justinianea. Ex recens. et cum not. *Schultingii*. Leyden, 1717. Leipsic, 1737. qto. This comprehends the fragments of Gaius, Paulus, Ulpian, and other jurisconsults preceding Justinian.

J. Gothofredus. Codex Theodosianus, cum amplissimo commentario, studio Antonii Marvilii Leyden, 1665. 6 vol. fol.

Secondly. Historical treatises on Roman Jurisprudence generally.

J. Gothofredi. Manuale juris 12mo. Several editions.

Jo. Vin Gravina. Origines juris civilis, seu de ortu et progressu juris civilis. With the annotations of Mascou. Leipsic, 1737. qto. Ven. 1739 to 4.

Hen. Chr. Hausotter. Historia legum romanarum. Leipsic, 1758. 8vo.

Jo. Gotl. Heineccius. Antiquitatum romanarum jurisprudentiam illustrantium Syntagma. This is comprehended in the Geneva edition of his works in 8 vols. qto. 1743 and 1748. But there are also several separate editions; the best at Strasburg (Argentor.) in 1734, 1741 and in 2 vol. 8vo. 1755.

Ejusdem historia juris civilis, 8vo. the best edition is Ritter's, published at Strasburgh. This and the preceding treatise form the fourth volume of his works, in qto.

Burchard Gotthelf Struvius. Historia juris romani, 4to. Jena, 1718.

Jo. Fr. Eisenhardt. Historia juris literaria. 8vo. Helmstadt, 1752, 1763.

Jo. Donatii. Historia juris civilis romanorum. Paris, 1678. 12mo.

Spanheim. Orbis Romanus.

Thomasius. Delineatio historiæ juris Romani et Germanici. Erfurt. 8vo. 1750. Nœvorum jurisprudentiæ romanæ, lib. duo. Halæ Magd. 1707.

Brunquellus. Historia juris Romano-Germanici. 8vo. Amstel. 1690. Gravina, Heineccius, Struvius and Brunquellus, may be considered as the best of this class of writers.

Histoire du droit romain par *Claude Joseph de Ferriere*. 12mo. Paris, 1718. This is taken chiefly from Gravina. Dr. Beaver has

translated it, and added Duck's treatise de usu et auctoritate juris civilis.

Ant. Terasson. Histoire de la Jurisprudence Romaine. Paris, 1750, in folio. Compiled at the direction of Chancellor D'Aguessau. A work, says Mr. Gibbon, of more promise than performance. It contains however a curious and interesting collection of ancient documents and fragments.

Dr. Beaver's history of the legal polity of the Roman state. 4to. 1781.

Dr. Taylor's elements of the civil law 4to. 1755. There is an anonymous abridgement of this desultory but very interesting book, by the Rev. Mr. Ellis, with a preface on the nature of moral obligation.

Bouchaud's Recherches historiques sur les edits des Magistrats Romains in tom. 41. page 1. of the Memoires de l'Academie Francoise.

THIRDLY. The principal editions of the Corpus juris civilis.

Corpus juris civilis cum glossis Genev. 1614. 4 vol. qto.

Idem cum notis D. Gothofredi. Paris. Vitray. 1628. 2 vol. fol. This is the edition I have employed.

Idem Daniel Elzevir. 1664. 2 vol. 8vo. Amst.

Idem. Elzevir et Bleau, 1681 1700. 2 vol. 8vo.

Corpus juris civilis academicum. Col. Mun. 1759. 1 vol. qto.

The editions of the Institutes, are too numerous to catalogue. There are also about a dozen editions of the Paraphrase of the Institutes, by Theophilus, in Greek and Latin, and in Latin.

FOURTHLY. Commentators on the Corpus juris, or particular parts of it.

These may be reduced to the works of *Cujacius*, *Vinnius*, *Voetius*, *Noodt*, and *Boehmer*. Harris quotes *Joachim Mysinger* frequently. I am not acquainted with any work of Mysinger's but his commentary on the title, de fide instrumentorum lib. 2 decretalium, Helmst. 1582, in fol. and Marp. 1602 8vo. I have found the brief notes of *D. Gothofred* to his edition of the Corpus Juris civilis, worth attention.

FIFTHLY Compilations on the civil law.

I possess a great number of them, but I know of few worth noticing, except the following.

Cujacii Paratitla in pandectas et Codicem : of which there are about eight editions in 12mo. and 8vo. separate from the general collection of his works.

Heineccii Elementa juris secundum ordinem Institutionum.

Idem secundum ordinem Pandectarum.

Of these there are several editions in 8vo. and 12mo. separate from his works.

Barriga de Montvallon. Epitome juris et legum Romanorum. 8vo. Paris 1756.

Claude Jos. de Ferriere. Nova et methodica juris civilis tractatio. 2vol. 12mo. Paris. The last of four editions is in 1734.

Ferriere. La Jurisprudence du Code de Justinian,
du Digest.
des Novelles.
} 1688. 6vol in

I have freely used the Nouvelle traduction des Institutes de l'Empereur Justinian of the same author, with notes, in 6 vol. 8vo. Paris. 17

Pothier's Pandectæ Justinianæ 3 v. fol. 1748.

Jean Domat. Les Loix civiles dans leur ordre naturel. 5 vol 8 and with a supplement by D'Hericourt in 2 vol. fol. Paris, 1734.

This has been edited in English by Strahan; and is the best generally used in England on this subject; though *Wood's* institute the civil law (fol.) is a very ufeful digest upon the whole.

Ayloffe's Pandect of the Roman civil law, fol. 1734, is a work not sufficient in learning, but too desultory and short.

Inconvenient brevity, also renders the following works of less value than they might be, though they are not destitute of merit.

Schomberg's Elements of the Roman Law. 8vo. 1780.

Dr. Halifax's Analysis of the civil law, a pamphlet 1775.

Dr. Arthur Brown's Elements of the civil and Admiralty law: Dublin, and London, 1802, is commonly used among the bar in this Country, and therefore I have purposely omitted many observations, that may be found also in that book; which though far too brief, deserves to be popular.

ADDENDA ET CORRIGENDA.

Page 42. Insert, as a title to the second section of tit. 15., Quis dicatur intestatus. N. B. The titles to the several sections being arbitrary, differ in different editions: and sometimes the sections themselves are differently divided. But there is a sufficient similarity in general to lead to the same passage in all the editions. I follow Harris in this respect.

Page 99. Insert, as a title to section 8, Quando conjunguntur tempora.

Page 188. For hæreditatis, read hæreditas.

Page 409, line the last. Cambaceres. I was mistaken in ascribing the Code Napoleon to Cambaceres. Mr. Du Ponceau has enabled me to correct this mistake. The authors or redacteurs of the Code civil Napoleon, were Portalis, Tronchet, Bigot-Preameneu, and Maleville, as appears by the Discours Preliminaire to the "Projet de Code civil," presented by those gentlemen as a committee appointed by government on the 24th Thermidor, year 8, and published the year after. Cambaceres indeed reported a project of a code civil to the convention some years before, which, although Portalis and the others praise sufficiently, they adopt sparingly. Cambaceres was consul in the year 9.

Page 462. By the civil law goods sold and delivered might be reclaimed, if not duly paid for. Quod vendidi non aliter fit accipientis quam si aut pretium nobis solutum sit, aut satis eo nomine datum, vel etiam fidem habuerimus emptori sine ullâ satisfactione. Dig. 18. 1. 19. Dig. 18. 1. 53. Dig. 19. 1. 13. 8. and 14. 4. 5. 18. It is with this modification that the civil law doctrine is to be understood, that the obligation of the contract *emptio venditio* arises not from the delivery of the goods to the vendee, but upon the mutual consent of the parties, the one to sell and the other to buy. Ut primum de re et pretio convenit, Emptio perfecta intelligitur, quamvis nec res traditur, nec pretium numeratum, nec arrha data sit. Atque in contractibus qui consensu perficiuntur, distinguenda perfectio contractûs, à consummatione sive implemento. Emptionem et venditionem *perficit* solus consensus de re et pretio; *consummat* rei traditio et pretii numeratio, qui extremus est contrahentium finis. Simulatque autem emptio perfecta est, nascitur utrinque obligatio, teneturque emptor actione ex vendito ut, nummos quos pretii nomine pro re venditâ promisit, solvat: venditor actione exempto, ut rem venditam tradat emptori. Vinn. l. 3. tit. 24. To this general doctrine, an exception was allowed in cases where earnest was given: in those cases, if the buyer repented, he forfeited his earnest money, and was free from the contract; if the seller repented, he forfeited the earnest money paid, and as much more. See also Inst. 2. 1. 4.

Formerly, by the general law of France, the seller might seize the thing sold, and not paid for, if he could find it in the possession of the buyer, and need not have shared it with the other creditors: and in some places of France, the seller might even pursue the article in pos-

session of a subsequent purchaser. See Domat's Civil Law, book 4. t. 5. sect. 2. art. 3., with the notes on that article, and on book 3. t. 1. sect. 5. art. 3. But this right by the new commercial code of France, art. 576, 577, et seq. is confined to stoppage in transitu, under provisions very similar to our own law. See Mr. Du Ponceau's translation of the commercial code, 2 Walsh's Review, p. 191, 192.

In England, before the statute of frauds, 29 Ch. 2. chap. 3. § 17. (which enacts, that "no contract for the sale of goods, wares, and merchandize, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties charged by such contract or their agents thereunto lawfully authorized") no bargain for goods was valid without earnest, delivery, or payment, except a contract to deliver at a future day appointed, and for a settled price; which might have been supported. Since that statute no verbal contract of bargain and sale unaccompanied by delivery or part delivery, payment or part payment, or earnest money (which may or may not be a part of the price, according to the intention of the parties, Pinnel's case, 5 Rep. 177., Pordage v. Cole, 1 Saund. 319., Manning v. Western, 2 Vern. 606., and Hamersly v. Knowlys, 2 Esp. N. Pr. Ca. 666., which are comments on the rule, quicquid solvitur, solvitur ad modum solventis) can be supported. It was for some time thought that executory contracts might be taken out of it; but all that class of cases relates to those sales only where the goods to be delivered are not finished, and cannot be delivered at the time of the contract; not to those which exist in solido, and are capable of present delivery. See Rondeau v. Wyatt, 2 H. Bl. 63, and Cooper v. Elston, 7 Term Rep. 14.

Page 463. The case of the United States v. The administrators of Hillegas, in the Circuit Court of the United States for the district of Pennsylvania, reviews all the authorities, and settles, that a surety is discharged by indulgence given to the principal on a new security. Add to the cases on surety, 10 East 39. 1 Bos. & Pull. 419. 4 Dall. 135.

Page 464. Stoppage in transitu. In Hodgson v. Loy, 7 Term Rep. 440, Lord Kenyon, and in ex parte Gwynne, 12 Ves. 382, Lord Erskine, state, that the right of stoppage in transitu is not founded on the right of the vendor to rescind the contract, but on an equitable lien, indulged to the vendor, from motives of reasonable expedience in the case of bargain and sale. To me, this right appears to have been suggested by the provisions of the civil law.

I believe it is considered that delivery to a *common carrier*, is such a delivery to the consignee, as to take away any right in the consignor to rescind the contract, though it leaves unimpaired the right of stopping in transitu ere the goods arrive at their place of destination. In the case of Walter and Fillis v. Jenks, Judge Washington determined that a vendor had a right in case of insolvency to seize his goods on board a general vessel, to which they were sent by the purchaser who had not paid for them, and *for whose use* they were ostensibly shipped, without any

assignment of the bill of lading, though they were in fact intended for the use of a distant creditor of the purchaser: for under the circumstances they remained completely in the power of the purchaser who shipped them, and who could at any time alter their place of destination.

In the case of a sale of land, where the purchase money is not paid, the Court of Chancery considers the purchaser a trustee for the seller, Pollexfen *v.* Moore, 3 Atk. 272., Blackburn *v.* Gryson, 1 Brown's Ch. Rep. 420.

Add to the cases of stoppage in transitu, Stubbs *v.* Lund, 7 Mass. Rep. 452, an instructive case, decided by a judge of no common talent.

Page 465. To the cases on the subject of delivery of goods to carriers, add Potter *v.* Lansing, 1 Johns. N. Y. Rep. 215.

Page 467. Servitudo. Servitudines. Services, servitudes, easements. I have stated, page 467, 468, that of the three translations, I have preferred *services:* here in agreeing with Dr. Wood, Dr. Taylor, and Dr. Harris, the compilers of the Napoleon code being neuter, I have against me, Lord Mansfield, in the case cited from 1 Burr. 443; Gibbon, 8 Rom. Hist. 73; Mr. Du Ponceau of Philadelphia, whose opinions on subjects of the civil law, I hold in great respect; and Mr. Jefferson, in his late learned and elaborate defence of the proceedings of the United States, in respect of Mr. Ed. Livingston's claim to the New Orleans Batture. In this tract the reader will meet with much collateral information on *alluvion*, *servitudes*, *prædia rustica et urbana*, and other points connected with the civil law. All these learned men translate servitudo by servitude. But to my ear, the last word seems exclusively appropriated in common language, to the situation of servants and slaves.

Page 553. I sent to Philadelphia the pages of Harris's edition that contained the 118th novel, to have the Greek printed there. Hence, not having it before me, I inadvertently translated that novel anew.

Page 582. Novation. This is somewhat allied to the English doctrine of *extinguishment.*

Page 583. For peredentum, read prudentum.

Page 615, near the top, for defective quality, read, non-delivery.

Page 617. Add to the cases respecting sales in market overt, Cheriot *v.* Foussat, 3 Binn. 220. 258.

Page 622. Commandite. I borrow the following note from Mr. Du Ponceau, to whom the bar are obliged for the useful translation of the French commercial code in the second volume of Walsh's Review, and very ably elucidated by the notes he has added to it.

Societé en commandite. Our language has no corresponding words to express this technical phrase, nor that of *associé commandataire* which is derived from it. We are therefore obliged to adopt the French words themselves as well as we can to our own idiom, with some variations for the sake of euphony and analogy, as far as these can be obtained.

This species of partnership, like the greatest part of the mercantile customs of Europe, draws its origin from Italy. Hence the words *commandite* and *commanditaire* are derived from the Italian *commando*, which itself takes its derivation from the Latin *mandatum.* Societé en *commandite* is as it were, *societas cum mandato*, a contract of partnership coupled

with a contract of *mandatum* or bailment. Such a partnership is co
posed of one or more acting and responsible, and one or more dorm
partners; the latter of whom are not bound by the acts of their as
ciates, beyond the amount they bring into the general stock. They ma
ly place their funds in the hands of others, to be employed in trade f
their benefit; and therefore these different partners, not only as betwe
each other, but as between them and the rest of the world, stand to
ther in the relation of *principal and factor:* mixed indeed, with some
the circumstances attending ordinary partnerships, but only in a cert
degree, and to a limited extent. From this mixture of relative rig
and duties, this species of contract has received its denomination.

These partnerships are useful in countries, where there are great
pitalists, who wish to employ a part of their money in trade with
exposing themselves to unlimited risks. They furnish employment
funds, which would otherwise remain inactive. The laws of Amer
and Great Britain however do not recognize such associations.

INDEX

AD

Libros, Titulos et Sectiones Institutionum.

roœmium *de Confirmatione Institutionum.*

De usu armorum et legum.

1. De bellis et legibus Justiniani.
2. De compositione codicis et pandectarum.
3. De tempore, auctoritatibus, fine et utilitate compositionis institutionum.
3. Divisio institutionum.
5. Quid in institutionibus contineatur.
6. Ex quibus libris compositæ sunt institutiones atque earum recognitio et confirmatio.
7. Adhortatio ad studium juris.

b. 1. Tit. 1. *De Justitiâ et Jure.*

Definitio justitiæ.

1. Definitio jurisprudentiæ.
2. De juris methodo.
3. Juris præcepta.
4. De jure publico et privato.

b. 1. Tit. 2. *De Jure naturali Gentium et Civili.*

De jure naturali.

1. Distinctio juris gentium et civilis, à definitione et etymologiâ.
2. Ab appellatione et effectibus.
3. Divisio juris in scriptum et non scriptum; et subdivisio juris scripti.
4. De lege et plebiscito.
5. De senatus-consulto.
6. De constitutione.
7. De jure honorario.
8. De responsis prudentum.
9. De jure non scripto.
10. Ratio superioris divisionis.
11. Divisio juris in immutabile et mutabile.
12. De objectis juris.

Lib. 1. Tit. 3. *De Jure Personarum.*
Prima divisio personarum.
1. Definitio libertatis.
2. Definitio servitutis.
3. Servi et mancipii etymologia.
4. Quibus modis servi constituuntur.
5. De liberorum et servorum divisione.

Lib. 1. Tit. 4. *De Ingenuis.*
De ingenui definitione.
1. De erroneâ ingenui manumissione.

Lib. 1. Tit. 5. *De Libertinis.*
Definitio et origo libertinorum et manumissionis.
1. Quibus modis manumittatur.
2. Ubi et quando manumitti potest.
3. De libertinorum divisione sublatâ.

Lib. 1. Tit. 6. *Qui et quibus causis manumittere non p*
Prius caput legis Æliæ Sentiæ, de manumittente i
dem creditorum.
1. De servo instituto cum libertate.
2. De servo instituto sine libertate.
3. Quid sit in fraudem creditorum manumitti
4. Alterum caput legis Æliæ Sentiæ de minor
annis.
5. Quæ sunt justæ causæ manumissionis.
6. De causâ semel probatâ.
7. Abrogatio posterioris capitis legis Æliæ Sen

Lib. 1. Tit. 7. *De lege Fusiâ Caniniâ Tollendâ.*

Lib. 1. Tit. 8. *De his qui sui vel alieni juris sunt.*
Altera divisio personarum.
1. De jure gentium in servos.
2. De jure civium Romanorum in servos.

Lib. 1. Tit. 9. *De Patriâ Potestate.*
Summa tituli.
1. Definitio nuptiarum.
2. Qui habent in potestate.
3. Qui sunt in potestate.

Lib. 1. Tit. 10. *De Nuptiis.*
Qui possunt nuptias contrahere.
1. Quæ uxores duci possunt vel non. De cogn
primum de parentibus et liberis.
2. De fratribus et sororibus.

3. De fratris et sororis filiâ vel nepte.
4. De consobrinis.
5. De amitâ materterâ, amitâ magnâ, materterâ magnâ.
6. De affinibus et primum de privignâ et nuru.
7. De socru et novercâ.
8. De comprivignis.
9. De quasi privignâ, quasi nuru, et quasi novercâ.
10. De servili cognatione.
11. De reliquis prohibitionibus.
12. De pœnis injustarum nuptiarum.
13. De legitimatione.

lb. 1. Tit. 11. *De Adoptionibus.*
Continuatio.
1. Divisio adoptionis.
2. Qui possunt adoptare filium familias, vel non.
3. De arrogatione impuberis.
4. De ætate adoptantis et adoptati.
5. De adoptione in locum nepotis vel neptis, vel deinceps.
6. De adoptione filii alieni in locum nepotis et contra.
7. De adoptione in locum nepotis.
8. Qui dari possunt in adoptionem.
9. Si is, qui generare non potest, adoptet.
10. Si fœmina adoptet.
11. De liberis arrogatis.
12. De servo adoptato, vel filio nominato, à domino.

ib. 1. Tit. 12. *Quibus modis jus patriæ potestatis solvitur.*
Scopus et nexus. De morte.
1. De deportatione.
2. De relegatione.
3. De servitute pœnæ.
4. De dignitate.
5. De captivitate et postliminio.
6. De emancipatione, item de modis et effectibus ejusdem.
7. Si alii emancipentur, alii retineantur in potestate.
8. De adoptione.
9. De nepote nato post filium emancipatum.
10. An parentes cogi possunt liberos suos de potestate dimittere?

ib 1. Tit. 13. *De Tutelis.*
De personis sui juris.
1. Tutelæ definitio.
2. Definitio et etymologia tutoris.
3. Quibus testamento tutor datur: et primum de liberis in potestate.

4. De posthumis.
5. De emancipatis.

Lib. 1. Tit. 14. *Qui testamento tutores dari possunt.*
Qui tutores dari possunt.
1. De servo.
2. De furioso, et minore viginti quinque annis.
3. Quibus modis tutores dantur.
4. Cui dantur.
5. De tutore dato filiabus, vel filiis, vel liberis, vel potibus.

Lib. 1. Tit. 15. *De legitimâ agnatorum tutelâ.*
Summa.
1. Qui sunt agnati.
2. Quis dicatur intestatus.
3. Quibus modis agnatio vel cognatio finitur.

Lib. 1. Tit. 16. *De capitis diminutione.*
Definitio et divisio.
1. De maximâ capitis diminutione.
2. De mediâ.
3. De minimâ.
4. De servo manumisso.
5. De mutatione dignitatis.
6. Interpretatio sectionis ult. sup. tit. prox.
7. Ad quos agnatos tutela pertinet.

Lib. 1. Tit. 17. *De legitimâ patronorum tutelâ.*
Ratio, ob quam patronorum tutela dicitur legitima.

Lib. 1. Tit. 18. *De legitimâ parentum tutelâ.*

Lib. 1. Tit. 19. *De fiduciariâ tutelâ.*
Filii familias à patre manumissi, pater tutor est legitimus; eo vero defuncto, frater tutor fiduciarius existit.

Lib. 1. Tit. 20. *De Atiliano tutore, et eo, qui ex lege Juliâ et Titiâ dabatur.*
Jus antiquum, si nullus sit tutor.
1. Si spes sit futuri tutoris testamentarii.
2. Si tutor ab hostibus sit captus.
3. Quando et cur desierint ex dictis legibus, tutores dari.
4. Jus novum.
5. Jus novissimum.
6. Ratio tutelæ.
7. De tutelæ ratione reddendâ.

Lib. 1. Tit. 21. *De auctoritate tutorum.*
In quibus causis auctoritas sit necessaria.
1. Exceptio.
2. Quomodo auctoritas interponi debet.
3. Quo casu interponi non potest.

Lib. 1. Tit. 22. *Quibus modis tutela finitur.*
De pubertate.
1. De capitis diminutione pupilli.
2. De conditionis eventu.
3. De morte.
4. De capitis diminutione.
5. De tempore.
6. De remotione et excusatione.

Lib. 1. Tit. 23. *De curatoribus.*
De adultis.
1. A quibus dentur curatores.
2. Quibus dentur.
3. De furiosis, et prodigis.
4. De mente captis, surdis, &c.
5. De pupillis.
6. De constituendo actore.

Lib. 1. Tit. 24. *De satisdatione tutorum vel curatorum.*
Qui satisdare cogantur.
1. Quatenus satisdatio in iis, qui satisdare non compelluntur, locum habere possit.
2. Qui ex administratione tutelæ vel curationis tenentur.
3. Si tutor vel curator cavere nolit.
4. Qui dictâ actione non tenentur.

Lib. 1. Tit. 25. *De excusationibus tutorum vel curatorum.*
De numero liberorum.
1. De administratione rei fiscalis.
2. De absentiâ reipublicæ causâ.
3. De potestate.
4. De lite cum pupillo vel adulto.
5. De tribus tutelæ et curæ oneribus.
6. De paupertate.
7. De adversâ valetudine.
8. De imperitiâ literarum.
9. De inimicitia patris.
10. De ignorantiâ testatoris.
11. De inimicitiis cum patre pupilli vel adulti.
12. De status controversiâ à patre pupilli illatâ.
12. De ætate.

14. De militiâ.
15. De grammaticis, rhetoribus et medicis.
16. De tempore et modo proponendi excusationes.
17. De excusatione pro parte patrimonii.
18. De tutelæ gestione.
19. De marito.
20. De falsis allegationibus.

Lib. 1. Tit. 26. *De suspectis tutoribus vel curatoribus.*
Unde suspecti crimen descendat.
1. Qui de hoc crimine cognoscunt.
2. Qui suspecti fieri possunt.
3. Qui possunt suspectos postulare.
4. Ad pubes vel impubes.
5. Qui dicatur suspectus.
6. De effectu remotionis.
7. De effectu accusationis.
8. Quibus modis cognitio finitur.
9. Si tutor copiam sui non faciat.
10. Si neget alimenta, decerni posse vel tutelam re merit.
11. De liberto fraudulenter administrante.
12. Si suspectus satis offerat; et quis dicatur suspect

Lib. 2. Tit. 1. *De rerum divisione, et acquirendo earum domi*
Continuatio et duplex rerum divisio.
1. De aëre, aquâ profluente, mari, littore, &c.
2. De fluminibus et portubus.
3. Definitio littoris.
4. De usu et proprietate riparum.
5. De usu et proprietate littorum.
6. De rebus universitatis.
7. De rebus nullius.
8. De rebus sacris.
9. De religiosis.
10. De rebus sanctis.
11. De rebus singulorum.
12. De occupatione ferarum.
13. De vulneratione.
14. De apibus.
15. De pavonibus et columbis, et cæteris anim mansuefactis.
16. De gallinis et anseribus.
17. De occupatione in bello.
18. De occupatione eorum quæ in littore invenium
19. De fœtu animalium.
20. De alluvione.

21. De vi fluminis.
22. De insulâ.
23. De alveo.
24. De inundatione.
25. De specificatione.
26. De accessione.
27. De confusione.
28. De commixtione.
29. De his quæ solo cedunt. De ædificatione in suo solo, ex alienâ materiâ.
30. De ædificatione ex suâ materiâ in solo alieno.
31. De plantatione.
32. De satione.
33. De scripturâ.
34. De picturâ.
35. De fructibus bonâ fide perceptis.
36. De fructibus à fructuario et colono perceptis.
37. Quæ sunt in fructu.
38. De officio fructuarii.
39. De inventione thesauri.
40. De traditione. 1. Regula ejusque ratio.
41. Limitatio.
42. Ampliatio.
43. De quasi traditione. Si traditio ex aliâ causâ præcesserit.
44. De traditione clavium.
45. De missilibus.
46. De habitis pro derelicto.
47. De jactis in mare levandæ navis causa: Item de his, quæ de rhedâ currente cadunt.

Lib. 2. Tit. 2. *De rebus corporalibus et incorporalibus.*
Secunda rerum divisio.

Lib. 2. Tit. 3. *De servitutibus rusticorum et urbanorum prædiorum.*
De servitutibus rusticis.
1. De servitutibus urbanis.
2. De reliquis servitutibus rusticis.
3. Qui servitute debere vel acquirere possunt.
4. Quibus modis servitus constituitur.

Lib. 2. Tit. 4. *De Usufructu.*
Definitio usufructûs.
1. Quibus modis constituitur.
2. Quibus in rebus constituitur.
3. Quibus modis finitur.
4. Si finitus sit.

Lib. 2. Tit. 5. *De Usu et Habitatione.*
Communia de usufructu et usu.
1. Quid intersit inter usufructum et usum fundi
2. Ædium usus.
3. De servi vel jumenti usu.
4. De pecorum usu.
5. De habitatione.
6. Transitio.

Lib. 2. Tit. 6. *De Usucapionibus et longi temporis prescriptionibus.*
Præcipua usucapionis requisita. 1. Bona fides. 2. Possessio per tempus definitum continuata. 3. Justus titulus.
1. De his, quæ sunt extra commercium.
2. De rebus furtivis et vi possessis.
3. De vitio purgato.
4. De re fiscali et bonis vacantibus.
5. Regula generalis.
6. De errore falsæ causæ.
7. De accessione possessionis.
8. Quando conjunguntur tempora.
9. De his qui à fisco, aut imp. Augustæve dono, si quid acceperunt.

Lib. 2. Tit. 7. *De Donationibus.*
De donatione.
1. De mortis causâ donatione.
2. De simplice inter vivos donatione.
3. De donatione ante nuptias vel propter nuptias.
4. De jure accrescendi.

Lib. 2. Tit. 8. *Quibus alienare licet vel non licet.*
De marito, qui, licet fundi dotalis dominus sit, alienare nequit.
1. De creditore qui, licet not sit dominus, tamen alienare pignus potest.
2. De pupillo, qui, licet dominus; non tamen sine tutoris auctoritate alienare possit.
3. Continuatio.

Lib. 2. Tit. 9. *Per quas Personas cuique acquiritur.*
Summa.
1. De liberis in potestate.
2. De emancipatione liberorum.
3. De servis nostris.
4. De fructuariis et bonâ fide possessis.
5. Continuatio.

6. De reliquis sui extraneis personis.
7. Transitio.

Lib. 2. Tit. 10. *De Testamentis ordinandis.*
Etymologia.
1. De antiquis modis testandi civilibus.
2. De antiqua testandi ratione prætoriâ.
3. De conjunctione juris civilis et prætorii.
4. Solemnitas addita à Justiniano.
5. De annulis, quibus testamenta signantur.
6. Qui testes esse possunt.
7. De servo qui liber existimabatur.
8. De pluribus testibus ex eadem domo.
9. De his qui sunt in familia testatoris.
10. De hærede.
11. De legatariis et fidei commissariis, et his, qui sunt in eorum familiâ.
12. De materiâ, in quâ testamenta scribuntur.
13. De pluribus codicibus.
14. De testamento nuncupativo.

Lib. 2. Tit. 11. *De militari Testamento.*
In militum testamentis solemnitates remissæ.
1. Rescriptum Divi Trajani.
2. De surdo et muto.
3. De militibus et veteranis.
4. De facto ante militiam testamento.
5. De milite arrogato vel emancipato.
6. De peculio quasi castrensi.

Lib. 2. Tit. 12. *Quibus non est permissum facere Testamentum.*
De filio-familias.
1. De impubere et furioso.
2. De prodigo.
3. De surdo et muto.
4. De cœco.
5. De eo qui est apud hostes.

Lib. 2. Tit. 13. *De Exhæredatione Liberorum.*
Jus vetus de liberis in potestate.
1. De posthumis.
2. De quasi posthumis.
3. De emancipatis.
4. De adoptivis.
5. Jus novum.
6. De testamento militis.
7. De testamento matris aut avi materna.

Lib. 2. Tit. 14. *De Hæredibus instituendis.*
Qui possunt hæredes institui.
1. Si servus hæres institutus, in eadem causâ manci vel non.
2. De servo hæreditario.
3. De servo plurium.
4. De numero hæredum.
5. De divisione hæreditatis.
6. De portionibus singulorum hæredum, si testator assem non diviserit, aut partes in quorundam personâ, non ultra assem expresserit.
7. Si pars vacet aut exuperet.
8. Si plures unciæ quam duodecim distributæ sunt.
9. De modis instituendi.
10. De conditione impossibili.
11. De pluribus conditionibus.
12. De his quos nunquam testator vidit.

Lib. 2. Tit. 15. *De vulgari Substitutione.*
De pluribus gradibus hæredum.
1. De numero hæredum in singulis gradibus.
2. Quam partem singuli substituti accipiant si partes in substitutione non expressæ sint.
3. Si cohæredi substituto alius substituatur.
4. Si quis servo, quo liber existimabatur, instituto substitutus fuerit.

Lib. 2. Tit. 16. *De pupillari Substitutione.*
Forma, effectus, origo, et ratio pupillaris substitutionis.
1. De substitutione mente capti.
2. Proprium pupillaris substitutionis.
3. Alia forma substituendi pupillariter.
4. Quibus substituitur.
5. Pupillare testamentum sequela paterni.
6. Quot liberis substituitur.
7. De substitutione nominatim aut generaliter facti.
8. Quomodo substitutio pupillaris finitur.
9. Quibus pupillariter non substituitur.

Lib 2. Tit. 17. *Quibus modis Testamenta infirmantur.*
Quibus modis testamenta infirmantur.
1. Quando testamentum dicatur rumpi: primum de adoptione.
2. De posteriore testamento.
3. De posteriore, in quo hæres certæ rei institutus.
4. De testamento irrito; et quibus modis fit irritum.
5. Cur dicatur irritum.
6. Quibus modis convalescit.

7. De nudâ voluntate.
8. Si princeps litis causâ, vel in testamento imperfecto institutus fuerit.

Lib. 2. Tit. 18. *De inofficioso Testamento.*
Ratio hujus querelæ.
1. Qui de inofficioso agunt.
2. Qui alio jure veniunt, de inofficioso non agunt.
3. De eo cui testatur aliquid reliquit.
4. Si tutor, cui nihil à patre relictum pupilli nomine legatum acceperit.
5. Si de inofficioso nomine pupilli agens succubuerit.
6. De quartâ legitimæ partis.

Lib. 2. Tit. 19. *De hæredum qualitate et differentiâ.*
Divisio hæredum.
1. De hæredibus necessariis.
2. De suis hæredibus.
3. De extraneis.
4. De testamenti factione.
5. De jure deliberandi, et de beneficio inventarii.
6. De acquirendâ vel omittendâ hæreditate.

Lib. 2. Tit. 20. *De Legatis.*
Continuatio.
1. Definitio.
2. De antiquis generibus legatorum sublatis.
3. Collatio legatorum et fidei commissorum.
4. De re legatâ. Et primum de re testatoris, hæredis, alienâ cujus non est commercium.
5. De re pignoratâ.
6. De re alienâ post testamentum à legatario acquisitâ.
7. De his quæ non sunt in rerum naturâ.
8. De eâdem re duobus legatâ.
9. Si legatarius proprietatem fundi alieni sibi legati emerit et usus fructus ad eum pervenerit.
10. De re legatarii.
11. Si quis rem suam, quasi non suam legaverit.
12. De alienatione et oppignoratione rei legatæ.
13. De liberatione legatâ.
14. De debito legato creditori.
15. De dote uxori legatâ.
16. De interitu et mutatione rei legatæ.
17. De interitu quarundam ex pluribus rebus legatis.
18. De grege legato.
19. De ædibus legatis.
20. De peculio.
21. De rebus corporalibus et incorporalibus.
22. De legato generali.

23. De optione legatâ.
24. Quibus legari potest.
25. Jus antiquum de incertis personis.
26. Jus antiquum de posthumo alieno.
27. Jus novum de personis incertis et posthumis.
28. De posthumo alieno hærede instituto.
29. De errore in nomine legatarii.
30. De falsâ demonstratione.
31. De falsâ causâ adjectâ.
32. De servo hæredis.
33. De domino hæredis.
34. De modo et ratione legandi: de ordine scriptu
35. De legato post mortem hæredis, vel legatarii.
36. Si pœnæ nomine relinquatur, adimatur, vel tra
ratur.

Lib. 2. Tit. 21. *De Ademptione legatorum et translatione*
De ademptione.
1. De translatione.

Lib. 2. Tit. 22. *De lege Falcidiâ.*
Ratio et summa hujus legis.
1. De pluribus hæredibus.
2. Quo tempore spectatur quantitas patrimoni quam ratio legis Falcidiæ redigitur.
3. Quæ detrahuntur ante Falcidiam.

Lib. 2. Tit. 23. *De fidei commissariis hæreditatibus.*
Continuatio.
1. Origo fidei commissorum.
2. De fidei commisso hæredis scripti.
3. Effectus restitutionis hæreditatis.
4. De senatûs consulto Trebelliano.
5. De senatûs consulto Pegasiano.
6. Quibus casibus locus est senatus consulto Tre ano vel Pegasiano.
7. Pegasiani in Trebellianum transfusio.
8. De quibus hæredibus, et in quibus fidei com riis, supra dicta locum habeant.
9. De eo, quod hæres voluntate testatoris de præcipitve.
10. De fidei commissis ab intestato relictis.
11. De fidei commisso relicto à fidei commissario
12. De probatione fidei commissi.

Lib. 2. Tit. 24. *De singulis rebus per fidei commissum re*
Summa.
1. Quæ relinqui possunt.

2. De libertate.
3. De verbis fidei commissorum.

b. 2. Tit. 25. *De Codicillis.*
Codicillorum origo.
1. Codicilli fieri possunt vel ante, vel post testamentum, imo etiam ab intestato.
2. Codicillis hæreditas directo dari non potest.
3. De numero et solemnitate.

b. 3. Tit. 1. *De hæreditatibus quæ ab intestato deferuntur.*
Definitio intestati.
1. Primus ordo succedentium ab intestato.
2. Qui sunt sui hæredes.
3. Quomodo sui hæredes fiunt.
4. De filio post mortem patris, ab hostibus reverso.
5. De memoriâ patris damnatâ ob crimen perduellionis.
6. De divisione hæreditatis inter suos hæredes.
7. Quo tempore suitas spectatur.
8. De nato post mortem avi, vel adoptato à filio emancipato.
9. De liberis emancipatis.
10. Si emancipatus se dederit in adoptionem.
11. Collatio filiorum naturalium et adoptivorum.
12. De bonorum possessione contra tabulas.
13. Unde cognati.
14. Emendatio juris antiqui. De adoptivis.
15. De descendentibus ex fœminis.

ib. 3. Tit. 2. *De legitimâ agnatorum successione.*
Secundus ordo hæredum legitimorum.
1. De agnatis naturalibus.
2. De adoptivis.
3. De masculis et fœminis.
4. De filiis sororum.
5. De proximis vel remotis.
6. Quo tempore proximitas spectatur.
7. De successorio edicto.
8. De legitimâ parentum successione.

ib. 3. Tit. 3. *De senatus-consulto Tertylliano.*
De lege duodecim tabularum et jure prætoriâ.
1. De constitutione divi Claudii.
2. Ad senatus consultum Tertyllianum. De jure liberorum.
3. Qui præferuntur matri, vel cum eâ admittuntur.
4. Jus novum de jure liberorum sublato.
5. Quibus mater præponitur et quibuscum admittitur.

6. De tutore liberis petendo.
7. De vulgo quæsitis.

Lib. 2. Tit. 4. *De senatus-consulto Orficiano.*
Origo et summa senatus consulti.
1. De nepote et nepte.
2. De capitis diminutione.
3. De vulgo quæsitis.
4. De jure accrescendi inter legitimos hæredes.

Lib. 3. Tit. 5. *De successione cognatorum.*
Tertius ordo succedentium ab intestato.
1. Qui vocantur in hoc ordine. De agnatis minutis.
2. De conjunctis per fœminas.
3. De liberis datis in adoptionem.
4. De vulgo quæsitis.
5. Ex quoto gradu vel agnati vel cognati succed

Lib. 3. Tit. 6. *De gradibus cognationum.*
Continuatio, et cognationis divisio.
1. De primo, secundo et tertio gradu.
2. Quartus gradus.
3. Quintus gradus.
4. Sextus gradus.
5. De reliquis gradibus.
6. De gradibus agnationis.
7. De graduum descriptione.

Lib. 3. Tit. 7. *De servili cognatione.*
Collatio ordinum et gradum.

Lib. 3. Tit. 8. *De successione libertorum.*
Qui succedunt, de lege duodecim tabularum.
1. De jure prætoriâ.
2. De lege Papiâ.
3. De constitutione Justiniani.
4. Quibus libertinis succeditur.

Lib. 3. Tit. 9. *De assignatione libertorum.*
An assignari possit, et quis assignationis effectus
1. De sexu assignati, et de sexu gradusqu assignatur.
2. De liberis in potestate vel emancipatis.
3. Quibus modis aut verbis assignatio fit: et de consulto.

3. Tit. 10. *De bonorum possessionibus.*
Cur introductæ bonorum possessiones; et quis sit earum effectus.
1. De speciebus ordinariis. Jus vetus.
2. Jus novum.
3. Species extraordinaria.
4. De successorio edicto.
5. De jure accrescendi et iterum de successorio edicto.
6. Explicatio dicti temporis.
7. Quomodo peti debet.

3. Tit. 11. *De acquisitione per arrogationem.*
Continuatio.
1. Quæ hoc modo acquiruntur. Jus vetus.
2. Jus novum.
3. Effectus hujus acquisitionis.

3. Tit. 12. *De eo, cui libertatis causâ bona addicuntur.*
Continuatio.
1. Rescriptum D. Marci.
2. Utilitas rescripti.
3. Ubi locum habeat.
4. * * * *
5. * * * *
6. Si libertates datæ non sunt.
7. De speciebus additis à Justiniano.

3. Tit. 13. *De successionibus sublatis, quæ fiebant per bonorum venditiones, et ex senatus consulto Claudiano.*

3. Tit. 14. *De obligationibus.*
Continuatio et definitio.
1. Divisio prior.
2. Divisio posterior.

3. Tit. 15. *Quibus modis re contrahitur obligatio.*
De mutuo.
1. De indebito soluto.
2. De commodato.
3. De deposito.
4. De pignore.

3. Tit. 16. *De verborum obligationibus.*
Summa.
1. De verbis stipulationum.
2. Quibus modis stipulatio fit. De stipulatione purâ vel in diem.

3. De die adjecto perimendæ obligationis causâ.
4. De conditione.
5. De loco.
6. De conditione ad tempus presens vel præteritum latâ.
7. Quæ in stipulatum deducuntur.

Lib. 3. Tit. 17. *De duobus reis stipulandi et promittendi.*
Quibus modis duo rei fieri possunt.
1. De effectu hujusmodi stipulationum.
2. De stipulatione purâ; et de die et conditione.

Lib. 3. Tit. 18. *De stipulationibus servorum.*
An servus stipulari possit.
1. Cui acquirat. De personâ cui stipulatur. De stipulatione impersonali.
2. De stipulatione facti.
3. De servo communi.

Lib. 3. Tit. 19. *De divisione stipulationum.*
Divisio.
1. De judicialibus stipulationibus.
2. De prætoriis.
3. De conventionalibus.
4. De communibus.

Lib. 3. Tit. 20. *De inutilibus stipulationibus.*
De his quæ sunt in commercio.
1. De his quæ non existunt.
2. De his quæ non sunt in commercio.
3. De facto vel datione alterius.
4. De eo, in quem confertur obligatio vel solutio.
5. De interrogatione et responsione.
6. De his qui sunt vel habent, in potestate.
7. De muto et surdo.
8. De furioso.
9. De impubere.
10. De conditione impossibili.
11. De absentiâ.
12. De stipulatione post mortem, vel pridie quam contrahentium moriatur.
13. De stipulatione præposterâ.
14. De stipulatione collatâ in tempus mortis.
15. * * * * * * *
16. De promissione scriptâ in instrumento.
17. De pluribus rebus in stipulatione deductis.
18. De pœnâ adjectâ stipulationi, alii dari.
19. Si intersit ejus, qui alii stipulatur.

20. De pœnâ adjectâ promissioni facti alieni.
21. De re stipulantis futurâ.
22. De dissensu.
23. De turpi causâ.
24. De morte contrahentium.
25. Quando agi potest ex stipulatione.

ɔ. 3. Tit. 21. *De fidejussoribus.*
Cur accipiuntur fidejussores.
1. In quibus obligationibus.
2. De hærede.
3. Si fidejussor præcedat vel sequatur obligationem.
4. De pluribus fidejussoribus.
5. In quam summam obligatur fidejussor.
6. De actione fidejussoris.
7. Si fidejussor græcè accipiatur.
8. Si scriptum sit, aliquem fidejussisse.

ɔ. 3. Tit. 22. *De literarum obligationibus.*

ɔ. 3. Tit. 23. *De obligationibus ex consensu.*

ɔ. 3. Tit. 24. *De emptione et venditione.*
De emptione purâ. De pretii conventione, arrhis, et scripturâ.
1. De pretio certo, vel incerto vel in arbitrium alienum collato.
2. In quibus pretium consistat. Differentia emptionis et permutationis.
3. De periculo et commodo rei venditæ.
4. De emptione conditionali.
5. De emptione rei, quæ non est in commercio.

b. 3. Tit. 25. *De locatione et conductione.*
Collatio emptionis, et locationis. De mercedis conventione.
1. De mercede collatâ in arbitrium alienum.
2. In quibus rebus merces consistat.
3. De Emphyteusi.
4. De formâ alicui faciendâ ab artifice.
5. Quid præstare debet conductor.
6. De morte conductoris.

b. 3. Tit. 26. *De societate.*
Divisio à materiâ.
1. De partibus lucri et damni.
2. De partibus inæqualibus.
3. De partibus expressis in unâ causâ.

4. Quibus modis societas solvitur. De renunci
5. De morte.
6. De fine negotii.
7. De publicatione.
8. De cessione bonorum.
9. De dolo et culpâ à socio præstandis.

Lib. 3. Tit. 27. *De mandato.*
Divisio à fine.
1. Si mandantis gratiâ mandetur.
2. Si mandantis et mandatarii.
3. Si alienâ gratiâ.
4. Si mandantis et alienâ.
5. Si mandatarii et alienâ.
6. Si mandatarii.
7. De mandato contra bonos mores.
8. De executione mandati.
9. De revocatione mandati.
10 De morte.
11. De renunciatione.
12. De die et conditione.
13. De mercede.

Lib. 3. Tit. 28. *De obligationibus quæ quasi ex contractu cuntur.*
Continuatio.
1. De negotiorum gestione.
2. De tutelâ.
3. De rei communione.
4. De hæreditatis communione.
5. De aditione hæreditatis.
6. De solutione indebiti.
7. Quibus ex causis indebitum solutum non repe

Lib. 3. Tit. 29. *Per quas personas obligatio acquiritur.*
De his qui sunt in potestate.
1. De bonâ fide possessis.
2. De servo fructuario, vel usuario.
3. De servo communi.

Lib. 3. Tit. 30. *Quibus modis tollitur obligatio.*
De solutione.
1. De acceptilatione.
2. De Aquilianâ stipulatione et acceptilatione.
3. De novatione.
4. De contrario consensu.

Lib. 4. Tit. 1. *De Obligationibus, quæ ex delicto nascuntur.*
Continuatio et divisio obligationum ex delicto.
1. Definitio furti.
2. Etymologia.
3. Divisio.
4. De furto concepto, oblato, prohibito, non exhibito.
5. Pœna.
6. Quomodo furtum fit; de contrectatione.
7. De affectu furandi.
8. De voluntate domini.
9. Quarum rerum furtum fit. De liberis hominibus.
10. De re propriâ.
11. Qui tenentur furti. De eo, cujus ope, consilio furtum factum est.
12. De his, qui sunt in potestate. Et de ope ac consilio extranei.
13. Quibus datur actio furti.
14. De pignore surrepto creditori.
15. De re fulloni, vel sarcinatori, vel bonæ fidei emptori surreptâ.
16. De re commodatâ.
17. De re depositâ.
18. An impubes furti teneatur.
19. Quid veniat in hanc actionem; et de affinibus actionibus.

Lib. 4. Tit. 2. *De vi bonorum raptorum.*
Origo hujus actionis, et quid in eam veniat.
1. Adversus quos datur.
2. Quibus datur.

Lib. 4. Tit. 3. *De lege Aquiliâ.*
Summa. Caput primum.
1. De quadrupede, quæ pecudum numero est.
2. De injuriâ.
3. De casu, dolo, et culpâ.
4. De jaculatione.
5. De putatione.
6. De curatione relictâ.
7. De imperitiâ medici.
8. De imperitiâ et infirmitate mulionis aut equo vecti.
9. Quanti damnum æstimetur et de hæredibus.
10. Quid æstimatur.
11. De concursu hujus actionis et capitalis.
12. Caput secundum.
13. Caput tertium. Quod damnum vindicatur.
14. De dolo et culpâ.
15. Quanti damnum æstimatur.
16. De actione directâ, utili, et in factum.

Lib. 4. Tit. 4. *De Injuriis.*

Verbum injuria quot modis accipitur.

1. Quibus modis injuria fit.
2. Qui et per quos injuriam patiuntur. De parente liberis, viro et uxore, socero et nuru.
3. De servo.
4. De servo communi.
5. De servo fructuario.
6. De eo qu' bonâ fide servit.
7. Pœna injuriarum ex XII tab. et ex jure prætoris
8. De lege Corneliâ.
9. De æstimatione atrocis injuriæ.
10. De judic o civili et criminali.
11. Qui tenentur injuriarum.
12. Quomodo tollitur hæc actio.

Lib. 4. Tit. 5. *De Obligationibus, quæ quasi ex delicto cuntur*

Si judex litem suam fecerit.

1. De dejectis vel effusis, et positis aut suspensis.
2. De filio familias seorsum habitante à patre.
3. De damno aut furto, quod in navi aut cauponæ stabulo factum est.

Lib. 4. Tit. 6. *De Actionibus.*

Continuatio et definitio.

1. Divisio prima.
2. De actione confessoriâ et negatoriâ.
3. De actionibus prætoriis realibus.
4. De Publicianâ.
5. De rescissoriâ.
6. De Paulianâ.
7. De Servianâ et quasi Servianâ seu hypothecari
8. De actionibus prætoriis personalibus.
9. De constitutâ pecuniâ.
10. De peculio.
11. De actione in factum ex jure jurando.
12. De actionibus pœnalibus.
13. De præjudicialibus actionibus.
14. An res sua condici possit.
15. De nominibus actionum.
16. Divisio secunda.
17. De actionibus rei persecutoriis.
18. De actionibus pœnæ persecutoriis.
19. De mistis; hoc est, rei et pœnæ persecutoriis
20. De mistis; id est, tam in rem quam in personam
21. Divisio tertia.
22. De actionibus in simplum.

23. In duplum.
24. In triplum.
25. In quadruplum.
26. Subdivisio actionum in duplum.
27. Subdivisio actionum in quadruplum.
28. Divisio quarta de actionibus bonæ fidei.
29. De rei uxoriæ actione, in ex stipulatu actionem transfusâ.
30. De potestate judicis in judicio bonæ fidei, et de compensationibus.
31. De actionibus arbitrariis.
32. Quinta divisio, de incertæ quantitatis petitione.
33. De pluris petitione.
34. De minoris summæ petitione.
35. Si aliud pro alio petatur.
36. Divisio sexta. De peculio.
37. De repetitione dotis.
38. De actione adversus parentem, patronum, socium, et donatorem.
39. De compensationibus.
40. De eo, qui bonis cessit.

Lib. 4. Tit. 7. *Quod cum eo, qui in alienâ potestate est, negotium gestum esse dicitur.*

Scopus et nexus.
1. De actione *quod jussu.*
2. De exercitariâ et institoriâ actione.
3. De tributoriâ.
4. De peculio, et de in rem verso.
5. De concursu dictarum actionum.
6. De filiis familias.
7. De senatus-consulto Macedoniano.
8. De actione directâ in patrem vel dominum.

Lib. 4. Tit. 8. *De noxalibus actionibus.*

De servis. Summa.
1. Quid sit noxa et noxia.
2. Ratio harum actionum.
3. Effectus noxæ deditionis.
4. De origine harum actionum.
5. Qui conveniuntur noxali actione.
6. Si servus domino noxiam commiserit vel contra.
7. De filiis familiarum.

Lib. 4. Tit. 9. *Si quadrupes pauperiem fecisse dicatur.*

De actione, si quadrupes ex l. XII tab.
1. De actione ædilitiâ, concurrente cum actione de pauperie.

Lib. 4. Tit. 10. *De iis, per quos agere possumus.*
Per quos agere liceat.
1. Quibus modis procurator constituatur.
2. Quibus modis tutores vel curatores constituan

Lib. 4. Tit. 11. *De Satisdationibus.*
De judicio personali.
1. De judicio personali.
2. Jus novum. De reo.
3. De procuratore actoris.
4. De procuratore rei præsentis.
5. De procuratore rei absentis.
6. Unde hæc forma discenda.
7. Ubi hæc forma observanda.

Lib. 4. Tit. 12. *De perpetuis et temporalibus actionibus et ad hæredes et in hæredes transeunt.*
De perpetuis et temporalibus actionibus.
1. De actionibus, quæ in hæredes transeunt vel n
2. Si pendente judicio reus actori satisfecerit.

Lib. 4. Tit. 13. *De Exceptionibus.*
Continuatio. Ratio exceptionum.
1. De exceptione, quod metus causâ, de dolo, i tum.
2. De non numeratâ pecuniâ.
3. De pacto.
4. De jurejurando.
5. De re judicatâ.
6. De cæteris exceptionibus.
7. Divisio prima.
8. Divisio secunda.
9. De peremptoriis.
10. De dilatoriis.
11. De dilatoriis ex personâ.

Lib. 4. Tit. 14. *De Replicationibus.*
De replicatione.
1. De duplicatione.
2. De triplicatione.
3. De cæteris exceptionibus.
4. Quæ exceptiones fide jussoribus prosunt vel n

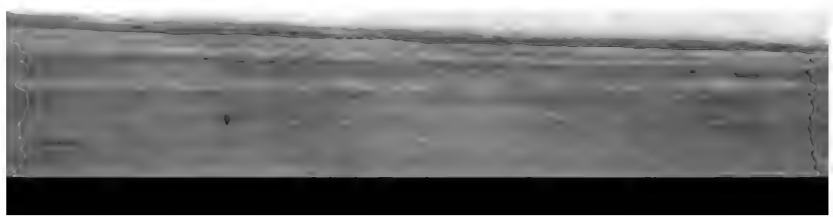
Lib. 4. Tit. 15. *De Interdictis.*
Continuatio et definitio.
1. Divisio prima.
2. Divisio secunda.
3. De interdictis adipiscendæ.

4. De interdictis retinendæ.
5. De retinendâ et acquirendâ possessione.
6. De interdicto recuperandæ et affinibus remediis.
7. Divisio tertia.
8. De ordine et vetere exitu.

Lib. 4. Tit. 16. *De pœnâ temerè litigantium.*
De pœnis in genere.
1. De jurejurando et pœnâ pecuniariâ.
2. De infamiâ.
3. De in jus vocando.

Lib. 4. Tit. 17. *De Officio Judicis.*
De officio judicis in genere.
1. De judicio noxali.
2. De actionibus realibus.
3. De actione ad exhibendum.
4. Familiæ erciscundæ.
5. Communi dividundo.
6. Finium regundorum.
7. De adjudicatione.

Lib. 4. Tit. 18. *De publicis Judiciis.*
De differentiâ à privatis.
1. Etymologia.
2. Divisio.
3. Exempla. De læsâ majestate.
4. De adulteriis.
5. De Sicariis.
6. De parricidiis.
7. De falsis.
8. De vi.
9. De peculatûs.
10. De plagiariis.
11. De ambitu, repetundis, annona, residuis.
12. Conclusio.



INDEX

TO THE

NOTES AND REFERENCES.

A

Accession - - - 459
Actions - - - - 638
Actiones,—Arbitrarii 641., ad exhibendum 383. 459., ædilitiæ 358. 646., bonæ fidei et stricti juris 339. 340. 584. 641., capitales 316., civiles 408., communi dividundo 384. 650., confessoriæ 327., constitutæ pecuniæ 640., damni injuriæ 312., directæ 317., directæ in patrem, &c. 353., de damno aut furto 638., exercitoriæ 349., exempto 609. 615., ex stipulatu 641., ex vendito 609. 615., familiæ erciscundæ 384. 641. 650., finium regundorum 384. 650., furti 304., furti manifesti 310., hypothecariæ 640., incitoriæ 349., injuriæ 323., in hæredes transeuntes 648., in factum (on the case) 305. 318. 627., in factum jurejurando 640., in simplum 336., in duplum 337. 609., in triplum 337. 641., in quadruplum 337. 641., locati 306., mistæ 641., negotiorum gestorum 452. 624., noxales 645., pauliana 638., de pauperie 646., pœnæ persecutoriæ 334., pignoratitiæ 604. 640., personales 328. 331., perpetuæ 647., pœnales 332., præjudiciales 640., prætoriæ 408., publicianæ 328., privatæ ex lege aquiliâ 316., de peculio 331. 346. 643., quasi ex maleficio 324., quanti minoris 609., quod jussu 349., reales 328. 333. 382., redhibitoriæ 609., recissoriæ 329., de in rem verso 350., rei persequendæ 334., repetitione dotis 346., rei uxoriæ 641., serviana, quasi serviana 639., servi corrupti 303., si quadrupes 357., subsidiary 453., temporales 647., tributoriæ 350., tutelæ 452., ex testamento 522., vi bonor. raptorum 309., utiles 317. 621.
Abjuration - - - 441
Acts of limitation - - 647
Adoption 440. 561
Adopted child - - - 499
Ademption of legacies 516. 530
Adition - - - 521
Ad promissor - - 462
Adrogation - - 441. 577
Advocate - - - 597
Advancement - - 515. 575
Æs et libra - - 443. 487
Affinity - - - 442
Age - - - - 431
Agnates, 430. 445. 539. 561. 564. 570. 571
Agnatio nuda - - 521
Agnomen - - - 526
Albericus Gentilis - 405
Alfenus - - - 404
Alcibiades - - - 432
Alexander (Papa.) - 425

Alluvion - - - 458
Amber - - - 460
Amita - - - 439
Antestator - - - 442
Anastasiana - - - 570
Animals mischievous - 646
Antistius Labeo - 459
Apparel - - - 525
Apothecary - - 596
Aqueduct - - - 467
Arrha (earnest) - 616
Arreoi - - - - 431
Aristotle - - - 431
Arbiter - - - 638
Assignment - - 470
Ascendants. See succession.
Atteius Capito - - 459
Attorney - 597. 645. 647

B

Bank notes - - 525
Banishment - - - 441
Barbeyrac - - - 405
Bargain and Sale 616. 617.
Bargains catching 642-3. 645
Barrington's Observ. - 414
Basilica - - - 577
Bastard - - - 416
Bees - - - - 458
Beneficium ordinis - 612
discussionis 612
cedendar. action 612
Bequests over - 522. 525
Bonorum possessio 559. 573. 575
Bon. poss. unde liberi 540. 573
legitimi 565. 573
cognati, 540. 562. 565. 567. 573
vir et uxor, 540, 573
decem personæ, 573
secundum tabulas 573
contra tabulas 573
tanquem ex familia 573
Books - - - 525
Boundary - - - 460
Bracton - - - -
Bribery (Ambitus) -
Burlamaqui - - -
Bynkershoek - 405.

C

Caius - - - -
Callistratus - - -
Capiatur pro fine - -
Captive - - -
Captivity - - -
Captive joint - -
Case, action on - -

CASES AMERICAN.

Adams v. Hemingsway, 627.
Adams v. Frothingham,
Adams qui tam v. Woods,
Anderson and Starks v. Fox,
Anderson v. Anderson,
Andries v. Wills, -
Argenbright v. Campbell,
Avery v. Inhab. of Tyringham, - - -
Baker's case, - -
Bates v. Holman, -
Bayley v. Ogden, -
Beasley v. Owen, - -
Bender v. Fromberger, 607.
Blackford v. Page, -
Brown's exors. v. Burrell,
Boudinot v. Bradford, 509.
Brent v. Chapman, -
Brooks v. Bemiss, -
Brown v. Lamberton, -
Brown v. Van Braam, -
Buckner v. Smith, -
Bull v. Horlbeck, -
Burd v. Smith, - -
Bussey v. Donaldson, -
Butler v. Boarman, -
Carson v. Blazer, - 455
Caswell v. Wendell, -

Cheetham v. Tillotson, - 635
Cheseldon v. Brewer, - 450
Cheriot v. Foussat - 672 a
Church v. Crocker, - 499
Clemson v. Bush, - 449
Clinton v. Crosswell, - 634
Cluson v. Gould, - - 634
Coates v. Hughes, - 498. 510
Cogbill v. Cogbill, - 511. 531
Commonwealth v. Blaine, 480
Conroe v. Bridshall, - 449
Cortelyon v. Vanbrundt, 455
——— v. Lensing, 476. 605
Cresoe v. Laidley, - 495
Croxall's Case, - - 623
Cowperthwaite v. Jones, 480

Dade v. Alexander, - 482
Defrees v. Trumper, - 610
Denton v. Noyes, - - 647
Dick v. Coleman, - - 482
Dighton v. Freetown, - 478
Donaldson v. Chambers, 623
Dunn v. Bray, - - 483

Eddowes v. Niell, - 614
Emery v. Greenough, - 623

Finsley v. Anderson, - 623
Fish v. Fisher, - - 478
Fitzhugh v. Anderson, - 450
Foot v. Tracey, - 634. 635
Forrestiere's Case, - 450
Foster v. Scofield, - 637
Fox v. Crosby, - - - 448

Genet v. Mitchell, - 635
George v. Elliot, - - 482
Gillet v. Mason - - 455
Glen's exors. v. Washmood, 623
Gore v. Brasier, - 607. 619
Gorgerat v. Murray, - 623
Grant v. Kearne, - 475
Graham v. Bickham, 606. 607
Gratz v. Ewalt, - - 617
Green v. Sarmiento, - 623
Green v. Long, - - 634
Guerand's exors v. Rivers, 607, 619

Hart v. Hosack, - - - 449
Henderson v. Allens, - 482
Harris v. Mandeville, - 623
Hart v. Cleiss, - - - 479
Hartness v. Thompson, et al. 449
Havard v. Davis, - 510. 531
Hight v. Wilson, - 491
Holland Company's Case, 530
Hotchkiss v. Lowthrop, 634
Hollingsworth v. Napier, 466
Hovey v. Clark, - - 639
Hudgins v. Wright, - 482
Hughes v. Heiser, - 628

Jack v. Eales, - - 480
Jackson ex dem. Renselaer v. Whitlock, - - 449
Same ex dem. Dunbar v. Todd, - - - 450
Jackson v. Jackson, - 438
James v. Allen, - - 623
Jenkins v. Tour, - - 482
Johnson v. Haines, - 495
Jordon v. Murray, - 483

Kennedy v. Lowry, 634. 635
Kettleby v. Fleet, - 479
Knapp v. Crosby, - 450

Lawson v. Morrison, 510. 531
Lane v. Gover, - - 450
Lewis v. Maris, - 491
——— v. Few, - - 635
Levy v. B. U. States, 594. 610
Liber et ux. v. Ex. of Parsons, 607. 619
Lindsay et al. v. the Commissioners, - - - 457
Link v. Benner, - - 478
Ludlow et al. v. Van Ranselaer, - - - 488
——— v. Browne and Eddy, 463, 465. 466
——— v. Symond, - 463. 614
Lyle v. Clason, - - 634

Marbury v. Madison, 599. 600
Marston v. Hobbs, 607. 618
M'Kee et al. v. Straub et al. 650

M'Lean v. Rankin, - 623
Miller v. Hall, - - 623
Miller Libellant v. Miller, 577
Moore's exors v. the Auditor, 483
Morris v. Phelps, - 607, 608
Musgrave v. Gibbs, 610

Neal v. Lewis, - - 635
Newby's Admrs. v. Blakey, 484
Negro Tash's case, - 484
Nelson v. Matthews, 620, 623
——— v. Emerson, - 635
Noble v. Smith, - - 475

Pallas et al. v. Hill et al. 482
Patty et al. v. Colin et al. 482
Payne v. Dudley, - - 623
Perit v. Wallis, - 606, 607
Perry v. Aaron, - - 610
The People v. Janson et al. 463
v. Freer, - 634
Pierson v. Post, - - 457
Pirate v. Bolt et al. - 480
Pitcher v. Livingston, - 607
Potter v. Lansing, - 618
Purviance v. Angus, - 607
Putnam v. Wilie, - - 460

Ramsay v. Lee, - - 483
Respub. v. Duane, - 634
——— v. Crips, - 636
——— v. Sharp, - 634
——— v. Sparhawk - 456
——— v. Negro Betsey 480
Ricketts v. Livingston, 518
Reilly v. Lamarr, - 620

Sable v. Hitchcock, - 478
Sally a negro v. Bealty, - 484
Scot v. Dobson, - - 481
—— v. Negro London, - 483
Scixas v. Wood, - - 610
Shaw v. M'Combs, - 636
Silver v. Shelback, - 449
Simms v. Slocum, 623
Smith v. Brown, - - 623
Smeeds v. Hoogtaling, 606, 607

Snell et al. v. Moses et al.
——— v. Rich, -
Somerville v. Johnson, -
Spiers v. Willison, -
Staat's ex. v. Ten Eyck,
Stansbury v. Minx, -
The State v. Gee, -
——— v. Welsh, -
——— v. Thackham et al.
——— v. Lehre, -
Stubbs v. Lund, -

Taylor v. Rainbow, -
Tabb et al. v. Archer et al.
Terry v. Forster, -
Tillotson v. Cheetham, -
Thomas v. Crosswell, -
——— v. Rumsey, -
Thompson v. Young, -
——— v. Ketcham,
Thorn v. Blanchard, -
Thursby's Ass. v. Gray's Administrators, 462, 613
Negro Tom's Case, -

Van Bramer v. Cooper,
Vanhorne v. Dorrance, -
Van Raugh v. Arsdaln,
Van Vechten v. Hopkins,
Van Winkle v. Ketcham,

U. States v. Fisher et al.
——— v. Hooe, -
——— v. Schooner Sally,

Wade v. Barnwell, -
Wallis v. Mease, - -
Webb v. Evans, - - -
Weed v. Ellis, -
Wilcox v. Rootes, -
Wilt v. Franklin, - -
Winkendon v. Hatfield,
Wheelright v. Depeyster,

Yerby v. Yerby, - -
Yeates v. Lensing, -

CASES ENGLISH.

Alderson v. Pope, - 622
Alexander v. Vaughan, - 639
Alfred v. Marquis Fitzjames, 478
Allen v. Ormond, - 468
—— v. Arme, - - 474
—— v. Allen, - - 525
—— v. Dundas, - - 595
Alleyn v. Alleyn, - - 518
Alpass v. Watkins, - 596
Andrew v. Trinity Hall, Cambridge, - - - 530
Andrews v. Blake, - - 607
Anonymous, - - 444
- - 445
- - 618
v. Jolland, - 645
Ansley v. Downing, - 490
Antrobus v. Smith, - - 474
Arkworth v. Atworth, - 518
Arlington, lord, v. Merrick, 463
Arnold v. Arnold, - 532
Astley v. Reynolds, - - 595
——— v. Weldon, - 606
Atkinson v. Atkinson, - 517
Atkyns v. Hill, - - 523
Attorney General v. Vigor, 508
v. Guise, 530
——— v. Greene, 530
v. Boultbee 530
v. Whitchurch, - - - 530
v. Andrew, 530
v. Bowyer, 530
v. Minshull, 530
v. Whitely, 530
v. Vigor, 532
Andeley v. —— - - 606

Bagget v. Frier et al. - 441
Bagott v. Orr, - - 456
Baker v. Bolton et al. - 637
Balandine v. Golding, - 622
Baldwin v. Rochford, - 644
Ball v. Herbert, - - 456
Ballot v. Ballot, - 618
Barebone v. Brent, - 595
Barcklay v. Lewis, - 463
Barker v. Parker, - 463
Barton v. Harrison, - 622
Barret v. Beckford, 517. 519
Baxter v. Dyer, - 506. 532
Baugh v. Read, - 519
Beauclark, lord, v. Dr. Mead, 497
Beaufort, duke of, v. Berty, 454
Beaumont v. Boltbee, - 645
Bellasis v. Uthwaite, - 519
——— v. Ermine, - 529
Bennet v. Mellor, - - 638
——— ex parte, - 645
Benson v. Gibson, - - 606
Berney v. Tyson, - 644
Biggleston v. Grubb, - 517
Bilbie v. Lumley et al. - 594
Bird v. Bird, - - 638
Birkett v. Jenkins, - - 464
in Vale v. Bale, 465
Bishop of Hereford v. Adams, 530
Bize v. Dickason, - 594
Black v. East India Com. 606
Blackmore v. Fleming - 606
Blois v. Blois, - - 517
Blount v. Burrow - 474
Blunden v. Barker, - 606
——— v. Parker, - - 644
Bolton v. Banks, - 646
Bolger v. Muckell, - - 569
Bond v. Gibson, - 622
Boone v. Eyre, - - 528
Bornmann v. Tooke, - 528
Bourden v. Alloway, - 627
Bovey v. Smith, - 644
Bowes v. Bowes, - - 531
Bowles v. Atkinson, - 611
Brady v. Cubit, - - 497
Brand v. Glasse, - 638
Brandywine v. Perrot, - 606
Bree v. Holbeach, 596. 610
Bridgman v. Green, - 645
Bristow v. Ward, - 530
Bromley v. Jefferies - 517
Brook v. Copeland, - 646
Brown v. Thompson, - 497
——— v. Dawson, - 517
Brown v. Selwyn, - 520

——— v. Higgs, - 530
——— v. M'Kinally, 583. 594
Brucker v. Fromont, - 646
Bruen v. Bruen, - - 519
Brummel v. Macpherson, 470
Brydges v. Dutchess of Chandos, - - - - - 506
Brydges v. Duke of Chandos, 532
Brymer v. Atkyns, - 605
Buck v. Buck, - - 594
Buckram v. Ingram, - 531
Budle v. Morris, - - 638
Buller v. Harrison, - 594
Bullock v. Pope, - - 462
Burgh et al. v. Preston, 612
Burghall v. Howard, - 465
Burdon v. Webb, - 583
Burrough v. Skinner, - 536
Burton et al. v. Gowell, 511
Bush v. Stainman, - 646
Bushel v. Bushel, - - 473
Butler v. Baker, - - - 508
Butter v. Wigge, - - 605
Buthen v. Street, - 607
Buyenden v. Sharp, - 646
Byrom v. Johnson, - 607

Cacanen v. Lithbridge, - 606
Calye's case, - - 638
Cambridge v. Rous, - 525
Camfield v. Gilbert, - 596
Campbell v. Jones, - - 528
——— v. Walker, 644, 645
Carrington, Lord, v. Payne, 506, 531
Carter v. Crawley, - 563
Cartwright v. Rowley, 583, 594
Casson v. Dade, - - 494
Cave v. Holford, 506. 531. 532
Chamberlain v. Harvey, 415. 477. 480
Chambers v. Donaldson, 441
——— v. Griffiths, - 596
Chancey's case, - 519, 520
Charman v. Charman, 508. 531
Chaplin v. Chaplin, - 519
Chapman v. Emery, - 473
——— v. Salt, - - 518
——— v. Hart, - 525
Chesterfield v. Jansen, - 644
Chidley v. Lee, -
Chilton v. Arborn, -
Chorley v. Bolcot, - -
Christopher v. Christopher,
Clark v. Sewel, 517, 518,
Clarke v. Seton, - 606,
Clavery v. Howe, -
Claude Ferriere's case,
Cleveland v. Ormond, -
Cocking v. Pratt, -
Coggs v. Bernard, - 604,
Coke v. Brooking, -
Coles v. Trecothick, -
Collet's case, - -
Colt v. Glover, -
Cooke v. Oakley, -
——— v. Munstone, - -
——— v. Olley, - -
Coope et al. v. Eyre, -
Cooper v. Elston, -
Copeley v. Copeley, -
Corbyn v. French, -
Cordage v. Pole, -
See Pordage v. Cole.
Couch v. Stratton, -
Covill v. Lamington,
Cowel v. Edwards, -
Coxe v. Harden, -
Cranmer's case, - 518,
——— ex parte, -
Cranvel v. Saunders,
Cray v. Mansfield, -
Craythorne v. Swinburne,
Cripps v. Reade, -
Crosbie v. Macdonald,
Cross v. Andrews, -
Crouch's case, -
Crowe v. Ballard, -
Cuming v. Brown,

Dale v. Sollet, -
Dance et al. v. Girdler,
Darley v. Darley,
Dashwood v. Lord Bulkeley,
Daw v. Swaine, -
Daws v. Peck, -
Day v. Edwards, -
Deacon v. Smith,
Dean v. Peal, -
Decks v. Strutt, -

Deering, Sir Edw. v. Lord Winchelsea, - 614
De Mainbray v. Metcalfe, 475
Deverell's case, - 599, 601
Dewberry v. Chapman, - 596
Digby v. Legard, - 532
Dilnot, Doe ex dem. v. Dilnot, 532
Dixon v. Baldwin, - 466
Doe v. Routledge, - 473
—— v. Pott, - - 508
—— v. Guy, - - 523
—— ex demise Hayter v. Joinville et al. - - 526
—— on demise of Winckby v. Pye, - - - 618
Dormer's case, - - 445
Douglas v. Ward, - 474
Draper's Company v. Davis, 645
Drope v. Thayne, - 648
Drury v. Smith, - - 474
Dry v. Boswell, - 622
Dufoir v. Pereira, - 531
Dunlop v. Waugh, - 610
Dunn v. Spurrier, - 642
Dutch v. Warren, - - 590
Dutton v. Solomonson, 464
Dyer v. Hargrave, - 611

East Ind. Com. v. Vincent, 618
Eastland v. Reynolds, - 529
Eastwick v. Caillard, - 639
Eastwood v. Vincke, - 519
Eckhardt v. Mellish, - 639
——— v. Wilson, - - 639
Eden v. Smith, - - 518
Edmonson v. Machell, 440
Edwards v. Truman, - 575
Elliott v. Edwards, - 596
—— v. Davis, - - 606
Ellis v. Hunt, - - 465
—— v. Smith, - - 530
Ellison v. Ellison, 507. 531, 532
——— v. Cookson, 516, 518
Elton v. Elton, - - 528
Elwes v. Maw, - - 525
Essex v. Atkins, - - 475
Evans v. Brander, - 606
Eyre v. Eyre, - - 497

Fairfax v. Trigg, - - 644
Farmer v. Arundel, 594, 595
Farrer v. Nightingale, - 596
Fearon v. Bowers, - - 465
——— ex parte, - - 532
Feize v. Wray, - 466
Feltham v. Terry, - 595
Fenn v. Harrison, - 610
Finch v. Finch, - - 518
Finner v. Longland, - 575
Flay v. Flay, - - 525
Flureau v. Thornhill, - 596
Folliott v. Ogden, 452. 623
Forse v. Hembling, - 497
Foster v. Denny, - - 454
Fowler v. Fowler, - 524
Fowel v. Forrest, - 605
Fowkes v. Joyce, - 618
Fox v. Macreath, - - 644
Freemantle v. Banks, - 518
Freke v. Lord Barrington, 530
Fydell v. Clarke, - 610

Garland ex parte, - - 622
Garrett v. Evers, - 524
——— v. Pretty, - - 529
Gelly v. Cleve, - - 477
——— v. Clarke, - - 638
Gibbons v. Caunt, - 506. 497
Gibson et ux. v. Scudamore, 524
——— v. Charters, - 629
——— v. Jeyes, - - 645
Gifford ex parte, - 648
Glazebrook v. Woodrow, 528
Glisson v. Ogden, - 644
Goodtitle v. Otway, 506. 508, 509. 532
Gov. and Comp. of the B. of Eng. v. Newmann, - 610
Graham v. Graham, 517. 519
Grantham's, Sir Thomas, case, 415, 477
Grave v. Salisbury, - 519
Graves v. Bovle, - - 517
Griffin v. Griffin, - 511
——— v. Devenille, - 645
Gryle v. Gryle, - - 494
Gull v. Bennett, - 445
Gunnis et al. v. Erheart, 596
Guidon v. Robson, - 622

Gwynne v. Heaton, - 644
——— ex parte, - - 672
Gyles v. Edwards, - 596

Haines v. Jeffel, - - 438
——— v. Jescott, - 427
Halbut v. Watts et ux. - 605
Hall v. Cazanove, - - 528
Hamilton v. Moheen, - 644
Hammersly v. Knowlys, - 671
Hammon v. Anderson, 466
Hanbury v. Hawbury, - 519
Hanning v. Ferrers, - 618
Hanson v. Mayer, - - 617
Harcourt v. Fox, 600, 601, 602
Hardacre v. Nash, - 522
Hardwicke, Lord, v. Vernon, 644
Hare v. Mitchell, - - 463
Harman v. Anderson, - 466
Harmood v. Oglander, 507. 508. 532
Harrison et ux. v. Dr. Burwell, 428
——— v. Foreman, - 531
Harper v. Wallis, - 595
Hartop v. Whitmore, - 517
Harvey v. Mangles, - 466
——— v. Aston, - - 528
Hassel v. Tynte, - 474
Hatch v. Hatch, - - 644
Havelock v. Geddes, - 528
——— v. Rockwood, - 624
Hawkes v. Saunders, 523, 587
Hawes v. Wyatt, - 644
Haynes v. Mico, - 519. 524
Hedges v. Hedges, - 575
Heron v. Heron, - - 644
Hervey v. Aston, - 529
Hesketh v. Blanchard, - 622
Hick's case, - - 634
Hill v. Good, - - 428
—— v. Mills, - - 455
Hilton v. Hilton, - 644
Hinchcliffe v. Hinchcliffe, 518
Hinckley v. Simmons, 506. 531
Hobson v. Trevor, - 606
Hodgson v. Loy, - 464. 671
Hogan v. Shee, - - 596
Hollin v. Byles, - 637
Holder v. Hower, 531
Holder v. Holder, - -
Holdipp v. Otway, 605, 606,
Holmes v. Coghill, -
Holmes v. Hall, - -
Holyland ex parte, -
Horton v. Day, -
Hoskins v. Hoskins, -
Hotham v. East Ind. Comp.
Hovey v. Clarke, - -
How v. Weldon, -
Howson v. Hancock, -
Hugget v. Montgomery, 646.
Hughes v. Hughes, -
——— ex parte, - -
Hume et ux. v. Edwards,
Humphrey v. Taylor, -
——— v. Taylern, -
Hunt v. Hort, - -
—— v. Silk, - -
—— v. Ellisden et al. -
Hunter v. Potts, - -
Hungerford v. Nosworthy,
Hussey v. Dillon, -
Hutcheson v. Hammond,

Ilchester, Lord, ex parte, 497.

Inglis v. Usherwood, -
——— v. Grant, - -
Irwan v. Dearman, 440.

Jacob v. Allen, - -
Jackson v. Burleigh, -
James, ex parte, - -
Jarvis v. Hayes, -
Jeacock v. Falkner, -
Jefferson v. Bish. of Durham,
Jefferys v. Jefferys, -
Jenkins v. Turner, -
——— v. Powel, -
Jerrard v. Saunders, -
Jesson v. Jesson, -
Johnson v. Smith, -
——— v. Johnson,
Jones v. Jones, -
——— v. Selby, -
——— v. Smith, -
——— v. Berkely, -
Joselyn v. Laciere, -

Keech v. Hall, - - 618
Kelly v. Powlett, - - 525
Kennel v. Abbot, - 526
Kennebel v. Scrafton, 497, 507
Kidney v. Coussmaker, - 475
King v. Loper, - - 438
—— v. de Manneville, - 438
—— v. Mosley, - - 438
—— v. Hopkins and wife, 438
—— v. Tottington, - 441
—— v. Broad Hembury, 441
—— v. Witton cum Twambrooke, - - - - 441
—— v. Roach, - - 441
—— v. Inhabitants of Cawhoneyborne, - - 441
—— v. Taunton St. M. Magdalene, - - - - 445
—— v. Inhabitants of Darlington, - - - - 445
—— v. Higgins, - 626
—— v. Philips, - - 626
—— v. Eggington et al. 625, 626
—— v. Donally, - - 625
—— v. Wiseman, - - 651
Kingston v. Preston, - 528
Kinlock v. Craig, - - 465
Kinnion v. Davis, - 646
Kirkman v. Kirkman, - 519
Knibs v. Hall, - - 594
Knight v. Cameron, - 529
Knollys v. Alcock, 506. 508. 531
Kymer v. Sowercropp, - 466

Lacey, ex parte, - - 644
Lamine v. Dorrell, - 595
Lancashire v. Lancashire, 497
Larkins v. Larkins, 509. 531
Latouche v. Lord Dusany, 473
Law v. East Ind. Comp. 463
Lawson v. Lawson, - 474
Layton v. Pearce, - - 605
Leake v. Leake, - 518
Leame v. Bray, - 627, 628
Lee v. Cox & D'Aranda, 517
Leech v. Leech, - 639
Lechmere v. Earl of Carlisle, 517
Leigh's case, - - - 647
Le Neve v. Le Neve, - 473
Liverpool Company v. Atkinson, - - - 463
L'Farrant v. Spencer, - 525
Lickbarrow v. Mason, 464, 465
Limbery v. Mason, - 508
Lincoln, Lord, v. Rolls, 509
Lister v. Lister, - - 644
Long v. Dennis, - 528
Longford v. Eyre, - 494
Longfort v. Administrators of Tyler, - - - 616
Longman v. Fenn, - 607
Lonsdale, Lord, v. Church, 606
Lotan v. Cross, - - 627
Lowe v. Peers, - - 606

Mackworth v. Thomas, 607
Maclure v. Dunkin, - 606
Macmanus v. Cricket, 628. 646
Maggison v. Moore, - 531
Malloy v. Barker, - 622
Manby v. Scott, - - 433
Manning v. Western, - 671
Marshall v. Rutton, 433. 441
Marriott v. Hampton, 583. 595
Martin v. Smith, - 528
Marsh v. Kevenford, - 596
Mascal v. Mascal, - - 518
Mason v. Grafton, - 638
—— v. Keeling, - 646
Matthews v. Warner, - 511
Maundrel v. Maundrel, 508. 532
Maunsell v. Lord Mazarene, 607
Mayor of Southampton v. Graves, - - - 523
Mayer v. Gowland, - 532
Mead v. Death et al. - 592
—— v. Younge, - - 610
Meade v. Daubigny, - 636
Medina v. Stoughton, - 610
Mellish v. Da Costa, - 454
—— v. Motteaux, - 611
Meredith v. Wynn, - 519
Middleton v. Dodswell, 444. 455
—— v. Lord Kenyon, 583
—— v. Wills, - 645
Miller v. Miller et al. - 447

Mills v. Ball, - - 466
Minnel v. Sarrazine, - 524
Mitchinson v. Hewson, 586
Moile v. Roberts, - 463
Montagne v. Jefferys, - 507
Morley v. Bird, - - 569
——— v. Gainsford, 646, 628
Mortlake v. Charlton, - 648
Morse v. Royal, - - 645
Moses v. M'Ferlan, 583, 587, 594, 595
Moulson v. Moulson, - 518
Murray v. Lord Elibank, 475
Mussen v. Prile et al. - 642

Nadin v. Battie and Wardle 605
Nantes v. Corrock, - 648
Neal v. Spencer, - - 629
Neersome v. Coles, - 622
Nelson v. Sheridan, - 607
Nesbitt v. Smith et al. 614. 463
Newdigate Sir Richard v. Davy, 395
Newson v. Thornton, 464, 465, 466
Newman v. Payne, - 645
Newton et ux. v. Hatter, 637
Nichols v. Judson, - 519
Noden v. Griffith, - 509
Northine v. Craig, - 466
Northey v. Strange, - 575
Nunn v. Wilsmore, - 639

Ogle v. Baines, - - 627, 628
O'Keefe v. Casey, - 454
Oldfield v. Round, - 611
Oldham v. Hand, - 645
Openheim v. Russel, - 466
Orr v. Churchill, - - 606
Osborn v. Chapman, - 644
Overbury v. Overbury, - 497
Owenson v. Morse, - 465
Oxenham et ux. v. Gayre, 423

Pacton v. Honnor, - 629
Page v. Whipple, - 629
Paget v. Haywood, - 529
Parkinson v. Lee, - - 610
Parten v. Baseden, - 522
Parse v. Waring, - 644
Parsons v. Mills et al. - 447
——— v. Freeman, - 508
——— v. Parsons, - 526
Pasley v. Freeman, - 610
Payne v. Whale, - - 596
Peach v. Phillips, - 532
Peacock v. Peacock, - 622
Pearne v. Lisle, - - 480
Pemberton v. Pemberton, 508, 531
People v. Ruggles, - 404
Peppin v. Shakespear, - 468
Perry v. Phillips, - 533
Phillips v. Phillips, - 525
——— v. Hunter, - - 595
——— v. Bacon, - - 606
Phinney v. Phinney, 517, 575
Phipps v. Annesley, - 519
Piggot v. Penrice, - 495
Pillans et al. v. Van Mierop et al. - - - - 586
Pindar v. Wadsworth, - 470
Pinnels' case, - - 671
Pitts v. Gaince, - - 622
Pole v. Lord Somers, - 518
Pond v. Underwood, - 595
Ponsonby v. Adams, - 607
Pordage v. Cole, - - 528, 671
Potter v. Brown, - - 622
Powel v. Cleaver, - 519
Power v. Wills, - - 539
Price v. O'Neal, - 610, 641
Prime v. Stebbing, - 518
Pulling v. Reedy, - 529
Pyne's case, - - 517

Quin v. Keefe, - - 622

Radcliffe v. Buckley, - - 445
Randall v. Morgan, - 475
——— v. Payne, - 528
——— v. Ennington, - 644
Rann v. Hughes, - 586
Rashleigh v. Salmon, - 607
Rawson v. Johnston, - 617
Read v. Marshall, - - 620
Reeves v. Brymer, - 445
Rees v. Barrington, - 480
Regina v. Inhabitants of Chi[illegible] worth, - - - [illegible]
Rex v. Meade, - - [illegible]

Rex v. Sowerby, - - 441
—— v. Woburn, - - 441
—— v. Taunton St. M. Magdalene, - - - 445
—— v. Sir Richard Haines, 455
—— v. Inhabitants of Batterton, 618
—— v. Thickness, - 629
Reynall Sir George's case, 601
Reynish v. Martin, - 528
Reynolds v. Lady Tenham 454
—— v. Clarke, - 468, 627
—— v. Ex parte, - 644
Richards v. Barton, 596
Richardson v. Goss, - 466
—— v. Greese, - 520
Richman v. Morgan, -
Ridgeway v. Darwin, - 452
Rigaut v. Gallisard, - 636
Roach v. Garvan, - - 454
Robinson v. Anderton, - 595
—— v. Bland, - 622
Roe on the demise of Connelly v. Vernon and Vyse, - 526
Rodney v. Chambers, - 433
Rogers v. Imbleton, - 627
Rolfe v. Peterson, - 606
Rondeau v. Wyatt, - 672
Rose v. Cunninghame, 532, 508
Rosewell v. Bennett, 517, 518
Roswell v. Vaughan, - 610
Routledge v. Dorril, - 530
Roy v. Duke of Beaufort, - 606
Rushworth ex parte, - 614
Russel v. Long, - 475, 567
Ryall v. Rolle, - - 604

Sadler v. Evans, - - 595
Sandy's case, - - 638
Saunders v. Owen, - 602
—— v. Churchill and Smith, 462
Saunderson v. Glass, - 645
Savage's case, - - 418
—— v. Forster, - 618
Savignac v. Roome, 628, 646
Saville v. Roberts, - 629
Scarborough Earl of v. Parker, 526
Scott v. Petit, - - 466
—— v. Tyler, - 528, 529
Scott v. Shepherd, - 527, 628
Seare v. Prentice, - 628
Sebiel v. Fairbaine, - 629
Seed v. Bradford, - 519
Selwood v. Mildway, - 531
Semple v. Bayley, - - 529
Shapholme v. Hart, - 645
Sharpe v. Sharpe, - - 493
Sharrington et al. v. Strotton, 586
Shell v. Rich, - - 646
Shepherd v. Shepherd, - 497
Shipman v. Stevens, - 447
Shirly v. Davis, - - 611
Short ex dem. Gastrell v. Smith et al. - - - 531
Shove v. Princk, - - 508
Sibthorp v. Moxon, - 520
Sill v. Worswick, - - 622
Simpson and Simpson v. Jackson, - - - 447
Skinner v. Gunton, - 629
Skip v. Hay, - - 463
Slubey et al. v. Heyward, et al. 466
Small v. Williams, - 606
Smith v. Gould, 480, 479, 414, 415
—— v. Goss, - - 466
—— v. Casen, - - 474
—— v. Strong, - - 519
—— v. Wilson, - 528
—— v. Woodhouse, - 528
——'s Case, - - 567
—— v. Buchanan, - 622
—— v. Collyer, - 608
—— v. Dickenson, - 606
—— v. Pelah, - - 646
—— v. Field, - - 617
Snee and Baxter v. Prescott et al. - - - 464
—— v. —— - - 465
Solomon v. Nissin, - 465
Somerset the Negro's case, 477, 478
Sparkes v. Cator, - 519, 518
Sparrow v. Hardcastle, 508, 509, 532
Spirks v. Robins, - - 519
Stevenson v. Mortimer, 594
Stewart v. Tichbone, - 532
—— v. Wilkins, - 610
St. John v. St. John, - 433

Stinton v. Hughes, - 606
Stokes v. Riviere, - - 464
Stone v. Cartwright, - 646
Stratton v. Rastall, - 463
——— v. Ralston, - 463
Stuart v. Earl of Bute, - 525
Sturgis v. Corp, - - 475
Sutton v. Moody, - 457
Swancot v. Westgarth, - 642
Sweet v. Pym, - - 466
Swift ex dem. v. Neale and Roberts, - - - - 509

Tappendon v. Burgess, - 639
Tate v. Hilbert, - - 474
Taylor v. Hare, - - 594
——— v. Rochford, - 644
Temple Ld. v. Duchess of Chandos, - - - - 506, 531
Thelussen v. Fletcher, - 607
Thomas v. Keymish, 519, 517
——— ex dem. Jones v. Evans, 511
——— v. Bennet, - 524
——— v. Thomas, - 526
——— v. Jones et al. - 531
Thomason and Hipgip v. Frere, 623
Thompson v. Havelock, 415
Thornhill v. Evans, - 597
Tolson v. Collins, 459, 460, 518, 519
Tomkins v. Barnet, - 594
Tomkings v. Ennis, - 473
Townsend v. Wathen, - 628
Townson v. Wilson, - 594
Towers v. Barrett, - 596
Trent v. Hanning, - 495
Trimmer v. Bayne, - 518
Tripe et al. v. Potter, - 627
Turner v. Philips, - 597
Tutens v. Hubbard, - 611
Twaites v. Smith, - 490
Twisden Lady v. Adams, 536
——— v. Twisden, - 519

Upton v. Price, - - 517

Vale v. Bayle, - - 464
Vaugh's case, - - 452
Veale v. Prieur, - - 601
Vere v. Lord Cowdon, - 457
—— v. Loveden, - 470

Walley v. Montgomery, 466
Wallop ex parte, - - 526
Walmsley v. Booth, - 645
Walsh v. Walsh, - - 563
Ward v. Turner, - - 474
——— v. Lunt, - - 517
Waring v. Griffith et al. 467
Warren v. Warren, 518, 519
Warring v. Knight, - 622
Waterman v. Soper, - 459
Watson v. the master of Hemsworth Hospital, - 470
——— v. Earl of Lincoln, 517
Watts v. Fullerton, - 508
Waugh v. Carver et al. - 622
Weakly v. Bucknell, - 618
Weaver v. Wood, - 627
Weatherall v. Gearing, - 470
Wellington v. Wellington, 497
Wennall v. Alney, - 583, 586
West v. Small, - 622
Weston v. Downey, - 596
Wetherden v. Embden, - 629
Wheeler v. Bingham, - 529
Whelpdale v. Cookson, - 644
Whichcote v. Laurence, - 544
White v. Sealy, - - 606
Whitfield v. M'Cleod, - 609
Wilcox v. Wilcox, - 517
Wilde v. Clarkson, - 606
Wilkenson v. Mawby, - 629
——— v. King, - 472
Williams v. Owens, - 531, 532
——— v. Macnamara, 608
Williamson v. Watts, - 449
——— v. Allison, - 610
Wilmot v. Woodhouse, - 520
Wilson v. Knubley, - 418
Winkley v. Pye, - - 618
Wiseman v. Vandeput, 464, 465
Woodward v. Cox, - 654
——— v. Gyles, - 606
Woollands v. Croucher, - 475
Wortes v. Clifton, - 482
Wright v. Proud, - 636
——— v. Morley, - 468

——— v. Russel, - 463
——— v. Lawes, - - 466
Wyndham v. Chetwynd (Preface.)
Wythe v. Thurlston, - 445

Yea v. Lethbridge, - 606
York v. Grindstone, - 638
Young v. ——— - 456
——— v. Peachy, - 644

Caveat emptor, - 610. 620
Cavillatio, - - - 409
Caution, - - 452, 647
Cautio de damno infecto, 637
Cautores, - - - 409
Celsus, - - - 404
Census, - - - 416
Certi condictio, - - 593
Cessio bonorum, - 622. 642
Chamberlain, - - 403
Child, - - - - 445
Child posthumous, - 496
Christianity, - - 432
Code Justinian, - - 403
Theodosian, - 614
Tuscan, - - 409
Russian, - - 409
Napoleon, - - 509
Codicil, - - 537. 539
Cognitores, - - - 597
Cognomen, - - - 526
Cognates, 430. 445. 561. 570. 572
Collaterals, see Succession.
Collation, (Hotchpot,) - 575
Commandite, - - 622. 672 a
Compensation, (set off,) 347. 528
Compromissor, - - 638
Commodatum, 583, 584. 593
Coemptio, - - - 421
Comprivigni, - - 423
Concilium semestre, - 453
Concubinatus, - 420. 432
Conditions, 501, 529, 605. 611
impossible, 501
precedent, 528
testamentary, 528
in restraint of marriage, - 528
Confarreatio, - 421. 436
Conjugium, - - 420
Consanguinity, - 422. 562
Consortium, - - 420
Contubernium - 416. 420
Consensus, - - 422
Consensus sponsalitius, 430
matrimonialis, 430
Consobrini. consororini, 439, 561, 562
Constitutum, - 581. 612
Constitutions, - - 406
Contracts, - - - 583
nominate, - 583
innominate, - 585
stricti juris, - 584
bonæ fidei, 338. 348, 584. 641
parol, - - 586
written, - 586
unilateral, - 593
construction of, 587
Conventio in manum, - 421
Covenants, - - - 528
Counsel, - - - 597
Cretion, - - - 521
Crimen, - - - 454
Cy pres, - - - 530
Cum elogio, (a specification) 495
Curator, 444. 450. 454. 476
Cures, - - - - 405

D

Damages, - 606. 637. 641
Debtor, - - - 642
Decurions, - - - 439
Decreta, - - - 407
Decree Macedonian, - 643
Dedetitii, - - - 417
Delivery of documents, 466
Denunciations, - - 333
Defalcation, - - 560
Defensores (counsel,) - 597
Depositum, - - 583, 584
Detention of a pledge, - 581
Deportation - - - 441
Degrees levitical, - - 427
Devises of land, - - 517
Digest, - - - 40

Diffarreatio, - - 436
Discidium, - - - 436
Disinherison, 495. 504. 513
Dies utiles, - - - 577
Divi fratres, - - 453
Divorce, - 433, 434. 438
Domi ductio, - - 421
Doli capax, - - - 626
Dolus malus, - - 473
Dogs, - - - - 629
Donatio mortis causa, - 474
inter vivos, - 474
ante nuptias, - 474
Do ut des, - - - 584
facias, - - - 584
Du Ponceau, Mr. 557. 671, 672, 672 *a*
Dupondium, - - 404. 501
Dower, - - - - 524
Dominium eminens, 456, 457
utile, - - 456
jure naturæ, 456
jure civili, 456

E

Easement, - - 468
Edicta, - - 406, 407
——— prætorum - 408
Edictales, - - - 404
Election, - - 530
Electrum, - - - 460
Emancipation, 442, 443. 477
Emperor, - - - 402
Emptio bonorum, - 578
venditio, 614. 616. 583, 584
Emphyteusis, 583, 584. 621, 622
Enmity, - - - 459
Enfranchisement, - 417
Epistolæ, - - 406, 407
Erciscundæ, - 384. 641. 650
Erciscundi, - - 459
Erciscere, - - 641
Herciscere, - - 641
Ἐρκος, - - - 641
Esquire, - - 416
Excellency, - - 416
Extranei, - - - 442
Exile, - - - 441
Executor, - - - 501
Exquæstor, - - 403
Expromissor, - - 462
Ex empto, - - 609. 615
Ex vendito, - - 615
Eviction, - - 607. 616

F

Facio ut des, - - 584
facias, - 584
Fabia lex, - - - 626
Familiæ erciscundæ, 384. 522. 641. 650
Falsa causa, - - 526
Farre, - - 421
Fees to Counsel, - 596
Physicians, - 597
of office, - 598
Females, - - - 446
Feræ naturæ - 457
Fictio brevis manus - 466
Fide jussion, Fide jussor, } 452. 581. 612. 614
Fidei commissa, 505. 534. 536
Filius familias, - 444. 541
Fishery, - - 455
Fixtures, - - 525
Flamen dialis, - 421
Florentinus, - - 404
Freedman, - 417. 578
Furniture, - 525
Forestalling (fraudatæ annonæ), 654

G

Germani, - - 568
Gillies, Dr. - - 431
Goods, - - - 525
Grotius, - - 406
Grandchild, - - 445
Guardian, - 445. 464. 644
Guarantee, - - 452
Gypsum, - - 408

Prescription, - - 471
Prodigals, - - 452, 494
Proctor, - - - 647
Pubertv, - - - 445
Pueritia, - - - 445
Public decorum, - 422, 430
Purchaser without notice, 473
Puffendorf, - - - 405
Pupils, - - - 444, 453
Punishment, - - 625

Q

Quartum trebellianum, - 536
Quasi contract, - - 624
posthumous, - 499
privignus, - - 431
nurus, - - 431
noverca, - - 431
serviana, - -
ex maleficio, -
usufruct, - - 468
Quiddam honorarium, - 597
Quires, - - - 405
Quirinus, - - - 405
Quæstor, - - - 403
Quotitè, - - - 416

R

Rank, - - - 422, 431
Ratahabitio, - - 422
Relationship, - - 422
Relegation, - - 441
Repudium, - - 434, 521
Renunciation, - 436, 521
Representation, - 539, 546, 558
Res fungibiles, - - 593
Responsa, - - - 408
Respectum parentelæ, - 424
Rescript, - - -
Divi Marci, - 578
Retention, - - - 581
Revocation testamentary, 497, 539
Rivers, - - 455, 456
Road, - - - - 467
Rutherforth, - - - 405

S

Sabinians, - - - 459
Sailors, - - - 644
Satisfaction, of portions, of dower, of debts, of legacies, 516, 530
Sanctuaries, - - 419
Scotch marriages, - 433
Seal, - - - - - 488
Selden, - - - - 428
Security, Surety, 452, 462, 613, 648
Senium, - - - 446
Serfs, - - - - - 413
Servi: Slaves, slavery, - 410
Servi pœnæ, - - 415, 442
Services: Servitudes, - 467
Seduction, - - 636, 651
Semi matrimonium, - 420
Senatus-consultum, 406, 541
Pegasianum, 532, 536
Sabinianum, - 558
Trebellianum, - 541
Tertyllianum, 564, 567
Orphitianum, 565, 567
Set-off, (Compensation) - 581
Sestertium, - - - 442
Settlement, - - - 505
Siclæ, - - - - 503
Sinendi modo, - - 525
Slavery. See servi.
Somerset, the negro case, 414
Socage, - - - 454
Sontica causa, - - 435
Socrates, - - - 431
Solicitor, - - 597, 644
Sodomy, - - 636, 651
Societas, (Partnership) 583, 584. 672 a
Spurious children, - 568, 571
Spado, - - - 441
Sponsalia, - - 430, 432
Stoppage in transitu, - 463
Stuprum, (Seduction) 636, 651
Stipend, - - - 462
Stipulation, - 583, 584, 605
partis et pro parte, 534

Stipulation, judicial, prætorian ædilitian, 608
Substitution, - 502, 505
pupillary, 503
Succession ab intestato, 539, 546
Suitas, - - - 514
Surgeons, - - - 597

T

Taylor, Dr. - - - 546
Tabulæ, - - - 503
Testament, 416, 485, 492, 510
military, - 491
in procinctu, 491
inofficious, 407, 504 511, 514
irritum, - 510
Testamenti factio, 488, 500, 520
Testes, - - - 442
Tertullian, - - - 435
Thelypthora, - - 432
Theft, - - - - 625
Thii, - - - - 572
Towing path, - - 456
Transfer, - - - 470
Tribute, - - - 462
Treasure trove, - - 461
Triumphator, - - 402
Trespass, vi et armis } on the case, } 627
Trustees, - - - 644
Trusts, - 536, 534, 644
Tutelage: Tutor, - 444, 447

U

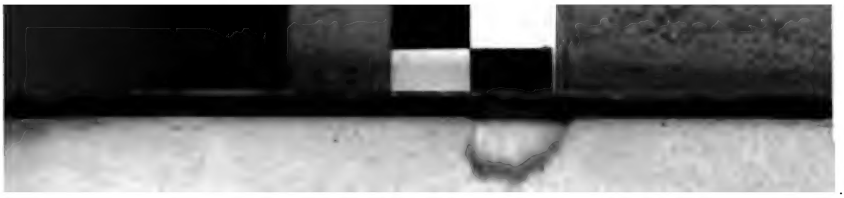
Ulpian, - - - 5
Umbricia, - - - 4
Unciæ, - - 50
Usc: Usufruct, - - 4
Usucapion, - - - 4
Uterini, - - - 4

V

Vattel, - - - 4
Ventre mittendo, - - 4
inspiciendo, - 4
Victor, - - - 4
Villenage, 413, 417, 47
Vinculo matrimonii, - 4
Vindications, - - 3
Vindicta, - - 416, 4
Virilitas, - - - 4
Vulgo quæsiti, (bastards)

W

Waif, - - - 4
Warranty, - 609. 6
Way, - - - 4
Widow, - - 4
Will. See Testament, 4
Wild creatures reclaimed,
Wild, (Jonathan) -
Witchcraft, - -
Witnesses testamentary,



To be had at the Bookstore of Patrick Byrne, Philadelphia.

THE OPINION delivered by Judge Cooper in the Court of Errors and Appeals, on the Effect of Sentences in Foreign Courts of Vice-Admiralty.

The Introductory Lecture of Thomas Cooper, Esq. Professor of Chemistry at Carlisle College, Pennsylvania. With Notes and References.

Contents of the Lecture.

General observations.
General classification of scientific knowledge.
Reasons for attempting a sketch of the history of chemistry.
Plan of the Lecture.
Chemistry noticed or alluded to in the Scripture.
Brass and Iron. Wine. Oil. Resins. Pitch. Bitumen. Engraving. Dyeing. Gilding. Plating. Butter. Milk. Bread. Corn Mills. Soap. Nitre. Beer.
Egyptian chemistry: viz. Glass. Dyeing and Painting. Beer. Vinegar. Medicines. Perfumes. Oil Linen. Poultry. Salt. Natron. Paper. Brass and Gold. Causes of the flourishing state of Egypt.
Grecian Chemistry.
Roman Chemistry.
Hindoo Chemistry.
Chinese Chemistry.
Chemistry of what are called the dark ages.
State of Chemistry in the time of Boyle, Mayow, Hooke, and Hales.
Stahl's theory of Phlogiston.
Black's discoveries in 1752.
Dr. Priestley's and Scheele's, 1771 to 1774.
Lavoisier's discoveries. French nomenclature.
Doctrine of Heat.
Galvanic Chemistry.
Mineralogy.
Geology.
Uses of Chemistry.
Conquerors.

Contents of the Notes.

Note
1. Hieroglyphic and alphabetic writing. Boustrophedon, Kionedon. Lord Elgin's collection.
2. Hindoo astronomy and chronology.
3. Effect of chemical and mechanical science in augmenting the disposable force of a country, instanced in Great Britain.
   Turnpike roads and Rail roads.
4. Reasons for adopting the Septuagint version.
5. Tubal Cain, Vulcan? Scriptural Metallurgy.
6. Wine as noticed in Scripture.
7. Embalming. Mummies.
8. Oil and Resins, among the Egyptians and Jews.

9. Pitch, Tar and Bitumen noticed in the Old Testament.
10. Rosin. Burgundy Pitch.
11. Gems. Engraving among the Jews.
12. Dyeing.
13. Gilding and Plating.
14. Golden Calf.
15. Butter and Milk.
16. Bread making.
17. Grist Mills.
18. Vinegar.
19. } Settlement of Egypt.
20. }
21. Ancient Knowledge of Glass. Nitre or Natron. Artificial Gems and coloured Glasses. Drinking Glasses. Burning Glasses. Window Glass. Lapis Specularis. Hothouses. Sudaria, or steam baths.
22. Egyptians and Hindoos compared.
23. Beer.
24. Oil.
25. Pitch and Tar.
26. Egyptian Linen manufactory. Transparent drapery.
27. Common Salt.
28. Natron. Sal Ammoniac. Alum.
29. Ancient Method of separating Gold from the Ore.
30. Serpents of Gold.
31. Papyrus. Books of the ancients.
32. Aristotle.
33. The shield of Achilles.
34. Nepenthe. Kaif.
35. Sugar. Saccharin.
36. Greek engraving.
37. Filtration. Calcination. Distillation.
38. Greek Fire.
39. Dyeing in Homer's time.
40. The Tea urn borrowed from the Romans.
41. Substances used in medicine. Pottery. Portland Vase. Mosaic Work.
42. Gunpowder, see note 45.
43. The Chinese of Hindoo origin.
44. The Egyptians, blacks.
45. Gunpowder known to the ancients? to the Hindoos and Chinese.
46. Scholastic Metaphysics.
47. State of the Iron Founderies in Great Britain in 1806.
48. French acknowledgment of Dr. Priestley's discovery of Oxygen.
Remarks on Mineralogical Nomenclature and Classification.
Werner's arrangement of Minerals.
Hauy's arrangement of Minerals.
Suggestions of the author.

ACC. NO.

CLASS MK. law

PUB.

DATE REC'D MAR 13 '48

AGENT

ORDER NO.

INVOICE DATE

COST

FUND

NOTIFY

PRESENTED ✓ Richard Hyde, Esq

EXCHANGE

BINDING

MATERIAL

SIZE

BINDER

INVOICE DATE

COST

COMMERCE LIBRARY
McGILL UNIVERSITY